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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.

Petitioners,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE P. MCANDREWS
(Counsel of Record)
TIMOTHY J. MALLOY
ROBERT C. RYAN
ALLEGRETTI, NEWITT, WITCOFF & MCANDREWS, LTD.
125 South Wacker Drive
Chicago, Illinois 60606
(312) 372-2160

PAUL E. SLATER
SPERLING, SLATER & SPITZ
55 West Monroe Street
Chicago, Illinois 60603
(312) 641-3200
Attorneys for Petitioners

February 28, 1984

Pandick Midwest Inc., Chicago • 454-7600

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in ruling that respondent medical associations and their members may conspire to and implement a nationwide boycott of all licensed doctors of chiropractic by all medical doctors and accredited hospitals by the use of codes of ethics and accreditation standards and thus prohibit defendants' members, and hospitals controlled by them, from all voluntary professional associations with chiropractors so as to "contain and eliminate" the profession of chiropractic and, on balance, significantly injure competition within the meaning of the Sherman Act, yet escape liability under the Rule of Reason by justifying their conduct on the basis of their concern for public health and welfare by demonstrating:

> (1) that they genuinely entertained concern for what they perceive as scientific method in the care of each person with whom they (sic)[1] have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.[2]

Pet. App. 34-35.

2. Whether the court of appeals erred in refusing to follow the majority opinion of this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and, instead, in relying on a two judge "dissent" in that case to announce that it was free to fundamentally "modify the Rule of Reason test" under Section 1 of the Sherman Act, 15 U.S.C.

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[1] The respondent associations have no patients—only their members can have patients.

[2] Even if, theoretically, the respondents' actions achieved their intended purpose of total elimination of the state licensed profession of chiropractic consisting of more than 23,000 chiropractors.

§ 1, to allow a significant restraint of competition to be justified by the purported good motives of professional associations whose members compete with the victims of the anticompetitive conduct. Pet. App. 33.

3. Whether the court of appeals erred in ruling that a horizontal group boycott by medical doctors intended to eliminate the competitive, state licensed health care profession of chiropractic and exclude doctors of chiropractic from competing against medical doctors in various health care markets, may escape the *per se* rule of illegality because the perpetrators are medical doctors who profess to be motivated by concerns for patient care and therefore "should be viewed and treated differently in the circumstances peculiar to a learned profession." Pet. App. 24.

4. Whether the court of appeals erred in ruling that evidence of the respondent medical associations' success in secretly "fixing" a supposedly "impartial" fact finding study by a body of experts as part of an effort to eliminate a competitive health care provider, which study ultimately formed the basis for a report by the Secretary of Health, Education and Welfare requested by Congress, was exempt from Sherman Act coverage by reason of the *Noerr-Pennington* doctrine, Pet. App. 38-39, notwithstanding the contrary ruling of the Court of Appeals for the District of Columbia that "no actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272, 278 (D.C. Cir. 1972).

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II. REPORT OF OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 719 F.2d 207 (7th Cir. 1983). A Supplemental Order of seven pages, issued on October 25, 1983, is unreported but appears in Petitioners' Appendix ("Pet. App.") attached hereto.

III. GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction under 28 U.S.C. section 1254(1) and 28 U.S.C. section 2101(c). The Judgment of the United States District Court for the Northern District of Illinois based on a jury verdict was entered on January 30, 1981. Pet. App. 56-57. The court of appeals' Judgment and Opinion were entered on September 19, 1983, Pet. App. 1-49, with a Supplemental Opinion and Order being entered on October 25, 1983, Pet. App. 50-54. All Petitions for Rehearing with Suggestions for Rehearing *en banc* were denied by the court of appeals on December 1, 1983. Pet. App. 55.

IV. STATUTES INVOLVED

The Sherman Act and Clayton Act statutes involved are printed in Pet. App. 79-82.

V. STATEMENT OF THE CASE

Petitioners, five doctors of chiropractic, brought this action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, as amended, to challenge a nationwide horizontal group boycott by respondents and their members designed to "contain" and "eliminate" the entire profession of chiropractic. See Pet. App. 75.

Jurisdiction was grounded on 28 U.S.C. section 1337. On January 30, 1981, following an eight week trial, a jury returned a verdict in favor of respondents. On September 19, 1983, the judgment entered on the verdict was reversed and the case remanded for a new trial by the United States Court of Appeals

for the Seventh Circuit, Pet. App. 1-47, which cited improper jury instructions and the improper admission of prejudicial evidence.

The court of appeals, in reversing, held that upon retrial: (1) that the Rule of Reason which this Court has adhered to for over sixty years should be modified[3] to allow defendants to justify a significant injury to competition on the basis of genuine concern for patient care; (2) that no *per se* instruction should be given because the case involves canons of medical ethics and defendants' purported "patient care motive"; and (3) that defendants' *sub rosa* efforts to distort and fix an allegedly unbiased report by the Secretary of HEW, which was requested by Congress, was exempt from Sherman Act coverage under the *Noerr-Pennington* doctrine "if the defendants undertook such efforts to influence governmental bodies with a sincere purpose to obtain the governmental actions they sought." Pet. App. 39.

These rulings are directly at variance with controlling precedent of this Court and with rulings of other circuit courts of appeal.

A. The Parties

1. Petitioners

Petitioners Wilk, Bryden, Arthur, Lumsden, and Pedigo are doctors of chiropractic duly licensed to practice that profession by the States of Illinois, Missouri, Colorado, Michigan, and California respectively. Chiropractors are health care professionals who compete against medical doctors in the treatment of certain physical disorders. As the court of appeals stated:

> Chiropractic is a health care service. Its primary therapeutic tool is spinal manipulation. Chiropractors and medical doctors treat some of the same medical problems. Chiropractors would treat some patients in health care facilities and would use hospital x-ray and laboratory services if such treatment and use was permitted.

Pet. App. 6 (footnote omitted).

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[3] "We hold that the district court and we are free to modify the rule of reason test in a case involving a certain kind of question of ethics for the medical profession. . . ." Pet. App. 32.

More than 23,000 chiropractors are licensed in the U.S. and chiropractors practice in all fifty states. There were approximately 130,000,000 patient visits to chiropractors in 1979 and between 800 and 850 million dollars were spent for chiropractic services. Approximately $30,000,000 in Federal Medicare payments were made for chiropractic services between July 1977 and September 1978.

2. Respondents

Respondents are the American Medical Association, a national professional association for medical physicians ("AMA"); the American College of Surgeons, a national professional association for surgeons ("ACS"); the American College of Physicians, a national professional association for internists ("ACP"); the American Academy of Orthopaedic Surgeons, a national professional association for orthopaedic surgeons ("AAOS"); the American College of Radiology, a national professional association for radiologists ("ACR"); the Illinois constituent body of the AMA ("ISMS"), the American Hospital Association, a national trade association for hospitals ("AHA"); the Joint Commission on Accreditation of Hospitals ("JCAH"), a national, privately owned and sponsored hospital accreditation body, the sponsors of which are, and the commissioners of which are appointed by, respondents AMA, AHA, ACS, and ACP. The four individual respondents were directly involved in formulating and implementing a nation-wide AMA program, joined in by the other respondents, which had as its "prime mission ... first, the containment of chiropractic and ultimately, the elimination of chiropractic." Pet. App. 6.

B. The Boycott

The court of appeals' Opinion of September 19, 1983, Pet. App. 4-12, and the Supplemental Order of October 25, 1983, Pet. App. 52-53, set forth the means by which each of the respondents participated in the plan, conceived by the AMA, to isolate doctors of chiropractic from all interprofessional and interinstitutional cooperation and contact. Many of the respondents' overt acts were publicly observable, while others

were *sub rosa* or covert.[4] But all were designed to eliminate chiropractors from the health care markets in which they compete against medical doctors. Set forth below are the principal devices used by respondents to boycott chiropractors.

1. Boycott of Interprofessional Association Between Medical Doctors and Chiropractors

There are no laws barring professional cooperation or association between state licensed medical physicians and state licensed doctors of chiropractic acting within the scope of their respective licenses. The AMA, however, formally declared that chiropractic was an "unscientific" discipline and that it was unethical for a medical physician who wished to professionally deal with chiropractors to do so. As a consequence, all professional cooperation or association between medical physicians and doctors of chiropractic such as consultations, referrals, joint research, shared academic and clinical experiences, joint care of patients, teaching at chiropractic colleges, taking x-rays for chiropractors, and doing lab work for chiropractors were forbidden. The court of appeals stated that the AMA coordinating committee for the boycott sent "letters warning medical boards and associations that professional cooperation and association between chiropractors and physicians were unethical and attempting to discourage colleges, universities, and faculty members from cooperating with chiropractic schools." Pet. App. 7-8.

2. Boycott of Institutional Support Services for Chiropractors

Respondents AMA, ACP, ACS and AHA, the sponsors of respondent Joint Commission On Accreditation of Hospitals ("JCAH"), utilized the JCAH as a vehicle to bar chiropractors from access to hospitals and hospital support services. The court of appeals summarized this evidence by stating:

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[4] For example: "The [AMA] committee has not submitted such a report [earlier] because it believes that to make public some of its activities would have been and continues to be unwise. Thus, this report is intended only for the information of the [AMA] Board of Trustees." Pet. App. 7 n. 5; Pet. App. 75.

> JCAH staff members replied to letters from hospitals on chiropractors by asserting that a hospital permitting chiropractors to use its services, such as laboratory testing and x-rays, would endanger its status as an accredited institution, even if a state passed a law requiring hospitals to allow chiropractors to be staff members.

Pet. App. 8-9. As a result any hospital which permitted a chiropractor to be on its staff or even provided him with x-ray or lab services jeopardized its commercially invaluable accreditation.

In addition, the court of appeals stated:

> [T]here were no laws in effect during the time relevant to this lawsuit that prohibited chiropractors from furnishing care in hospitals under the supervision of a medical staff member, nor were there laws preventing hospitals from providing x-rays or laboratory services to chiropractors or preventing hospital x-ray departments or radiologists from making x-ray films or copies of x-rays available to chiropractors at the request of their patients.

Pet. App. 6. Nonetheless, at the request of the AMA committee that organized the boycott, the general counsel's office of the AMA published in the Journal of the American Medical Association a "legal opinion" entitled "The Right and Duty of Hospitals to Exclude Chiropractors." See Pet. App. 9.

3. Boycott of Health Insurance for Services of Chiropractors

The boycott included working with national insurance companies, such as Blue Shield and the Health Insurance Association of America ("HIAA"), a national trade association of insurance companies, to discourage or impede insurance coverage for services provided by chiropractors. For example, as set forth in the AMA boycott coordinating committee documents:

> d. CHIROPRACTIC COVERAGE UNDER BLUE SHIELD—[AMA] Staff will continue to maintain liaison with the National Association of Blue Shield Plans in regard to chiropractic attempts to gain coverage under

> Blue Shield. (NOTE: A productive meeting was held with representatives of Blue Shield on this point. They are actively considering various methods of *excluding* chiropractors from Blue Shield coverage.)

Plaintiffs' Exhibit ("PX") 273 (emphasis added). In subsequent Blue Shield documents there appears, "Resistance to chiropractic payment may be indicated by the fact that fewer [Blue Shield] Plans make payment *than the laws require.*" PX 429, p. 2 (emphasis added).

4. Boycott of Providing X-Ray Services to Chiropractors or Their Patients

The American College of Radiology, in conjunction with its general participation with the AMA boycott, declared it to be unethical for radiologists to submit already existing x-ray films of a patient or other medical records to a chiropractor or even to the patient to be conveyed to a chiropractor. As a result a patient who had already been x-rayed by a medical doctor had to either submit to additional x-rays or refrain from seeking chiropractic care.

5. Consequences of the Boycott

The court of appeals ruled that there was evidence that:

> Through such mechanisms, individual physicians were discouraged from cooperating with chiropractors in: patient treatment, because referrals were inhibited by defendants' activities; research; and educational activities, such as sharing clinical experience and research results. Chiropractors were denied access to the hospital facilities they considered necessary to practice their professions. Medical doctors were discouraged from aiding chiropractors in interpreting electrocardiograms. Requests by individual plaintiffs to use laboratory and x-ray facilities were not granted; requests for hospital in-patient privileges were similarly denied. Referrals from medical doctors were reduced. Public demand for chiropractic services was negatively affected. (Pet. App. 8.)

An attorney for the Judicial Council of the American Medical Association, in writing to the member who had suggested easing the AMA's ban on cooperation with chiropractors, stated, "The facts are that chiropractic has not grown in number under existing policy, whereas there is every evidence to believe that it would grow if AMA policy decisions were relaxed." PX 253, Pet. App. 65.

C. Interference With Fact Finding Body

In 1967 Congress asked the Secretary of the Department of Health, Education and Welfare to have an unbaised study conducted to determine the need for including coverage for chiropractic services under the Medicare Act. PX 239, Pet. App. 72. Petitioners presented evidence that respondent AMA secretly subverted this Report by working with medical physician members of HEW and of the Expert Review Panel to develop conclusions negative to chiropractic even before the study commenced. As a result, more than five months before the study was begun, an AMA member who was a consultant to HEW was able to report complete acceptance by an HEW consultant group "of the concept of preparing the decision on the basis of lack of scientific merit." PX 1414, Pet. App. 69.

Because of sensitivity to discovery by Congress, the AMA informed the AMA member that was a consultant to HEW that the "AMA hand must not show" in the chiropractic study. PX 220.

Another AMA member who was on the Expert Review Panel secretly informed the AMA which panelists were "soft" on chiropractic, PX 1579, and then the AMA secretly contacted those panelists "to coach" them. PX 482, Pet. App. 70. The panelists were told that

> the American Medical Association has stated that it is unethical for a physician to refer a patient to these [chiropractors] and likewise could be expected to voice strong opposition [to inclusion of chiropractors under Medicare]. Even if such a proposal became law, its implementation would require mass and open defection on

the part of medical doctors from the policies of its own association. (PX 702A, p. 12).

When Congress asked HEW to respond to a charge that the resulting negative Report had been "fixed" by secret AMA involvement, the individuals at HEW that had worked with the AMA informed Congress that the advisory group had neither heard nor considered "material from any group other than those being studied. . . ." PX 239, p. 5, Pet. App. 73. This was transparently false. As a result of the negative Report of the supposedly impartial Panel, Congress delayed including chiropractic services in Medicare for five more years. Moreover, the negative Report itself became a basic AMA public relations document used in justifying and convincing others to join the national, private boycott of chiropractors. *E.g.*, PX 1397.

D. Legal Rulings By the Court of Appeals

1. The Rule of Reason

The court of appeals acknowledged that in *National Society of Professional Engineers v. United States*, 435 U. S. 679, 691 (1978), this Court relied on *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918), for the proposition that for 60 years it has "adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promoted competition or one that suppresses competition." Pet. App. 24. Nevertheless, relying on a two judge "dissent" authored by Justice Blackman in *Professional Engineers*, the court of appeals held that it was "free to modify the Rule of Reason test in a case involving a certain kind of question of ethics for the medical profession. . . ." Pet. App. 33. Accordingly, the court of appeals held that the Rule of Reason would not necessarily be violated even if petitioners met the age old test that competition was on balance suppressed by the boycott. Rather, the court of appeals held that even a significant injury to competition could be justified if respondents "meet their burden" of proving that they were

motivated by a genuine concern for patient care. Pet. App. 35. The court of appeals candidly admitted that it was weighing public policy goals other than competition as part of the Rule of Reason analysis. The court stated, at Pet. App. 34:

> A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds. Because Congress has for so long assigned such pronounced value to freedom of competition and the Supreme Court has for so long applied the rule of reason so as virtually to exclude other values (except, for example, the value of activity protected by the first amendment), the adaptation of the rule of reason in the Principle 3 setting should impose a heavy burden on those who would justify conduct having significant anticompetitive effect.

2. The *Per Se* Rule

The court of appeals recognized that as recently as *Arizona v. Maricopa County Medical Soc'y*, 457 U. S. 332, 349-51 (1982), this Court had approvingly quoted from *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1, 5 (1958), "Among the practices which the courts have heretofore deemed to be *unlawful in and of themselves* are price-fixing, division of markets, *group boycotts*, and tying arrangements." Pet. App. 22 (emphasis added). The court of appeals, nevertheless, set out a new limitation on *per se* rules holding, as a matter of first impression,[5] that only price fixing or boycotts to enforce price fixing constitute *per se* offenses. Specifically the court held "that boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se*—for example, price-fixing

[5] The Court relied on two cases. Pet. App. 23. One *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F. 2d 781, 787-90 (7th Cir. 1981), does not even remotely support the court's holding. The other case, *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F. 2d 1488, 1495 (7th Cir. 1983) (opinion vacated July 19, 1983), had been vacated by the grant of a Petition for rehearing *en banc* prior to the rendering of the appellate decision herein.

agreements." Pet. App. 23. The court of appeals here found that:

> The evidence was that the compulsion to be exerted upon medical doctors, hospitals, x-ray facilities, and laboratories through the conspiracy, if the jury found there was such intended compulsion, was to engage in the boycott itself, and not to exert, through boycott, compulsion upon any one to do or to refrain from doing anything else.

Pet. App. 23. In addition, the court of appeals created a new and unprecedented rule of law by concluding that "because of evidence of the 'patient care motive' " for the boycott, petitioners are not entitled to a *per se* instruction. Pet. App. 23.

3. Interference With Fact Finding Body—Application of the *Noerr-Pennington* Doctrine

Finally, the court of appeals decided that respondents are insulated from any antitrust consequences for "fixing" the HEW appointed Expert Review Panel or its Report if the respondents were "sincere" in seeking the government actions they sought. Pet. App. 39-40. Petitioners had objected that the instruction was erroneous in view of the ruling of the Court of Appeals for the District of Columbia in *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272, 278 (D. C. Cir. 1972), that: "No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption."[6] See Petitioners' Proposed Instruction 55, Pet. App. 61. Nevertheless, notwithstanding substantial evidence of a "fix," the court of appeals approved a *Noerr-Pennington* instruction, A44, Pet. App. 59, that reads:

> I charge you that none of these activities directed toward influencing legislators or other public officials may be considered by you as a violation of the antitrust laws, provided you believe the defendants undertook such ef-

[6] The *Israel* case closely tracks the language of this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972): "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations."

forts to influence governmental bodies with a sincere purpose to obtain the governmental actions that they sought.

Under the circumstances, the instruction clearly grants antitrust insulation to those who sincerely defraud or fix government study panels or Expert Review Panels and then subsequently use the ill-gotten product in furtherance of a national private boycott.

VI. DISCUSSION

A. The Court of Appeals' Modification of the Rule of Reason Is in Direct Conflict With the Decisions of This Court and Other Courts of Appeal

The court of appeals acknowledged that it was departing from the "single standard" under the Rule of Reason that has been followed by this Court for over 60 years. In a special accommodation to certain health care trade associations and the medical profession the court ruled, Pet. App. 32, 34-35:

> We hold that the district court and we are free to modify the rule of reason test in a case involving a certain kind of question of ethics for the medical profession. . . .
>
> . . . .
>
> . . . A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds. *Because Congress has for so long assigned such pronounced value to freedom of competition and the Supreme Court has for so long applied the rule of reason so as virtually to exclude other values. . .*, the adaption of the rule of reason in the Principle 3 setting should impose a heavy burden on those who would *justify conduct having significant anticompetitive effect.*
>
> The jury should be instructed in appropriate language to the following effect: The burden of persuasion is on the plaintiffs to show that the effect of Principle 3 and the implementing conduct has been to restrict competition rather than to promote it. If the plaintiffs have met this burden, the burden of persuasion is on the defendants to

> show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.
>
> ... Only if the defendants ... meet their burden, as described, does their conduct escape condemnation as unreasonable. (Emphasis added.)

In making its modification of the Rule of Reason the court of appeals gave respondents a new antitrust defense never sanctioned by Congress or by this or any other court[7] and directly counter to this Court's previous rulings.

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[7] In a Report prepared for the F. T. C. is found the following:

> A few lower courts, doubting the premise that competition would be desirable, have been reluctant to give full effect to the law's implications in the health care sector. But legal experts suggest it may be only a matter of time before it is made clear that judges are not to decide whether competition is good or bad or works well enough to be encouraged but only whether it has been unreasonably impaired. If that occurs, the result would be that the medical profession would be barred from engaging in certain conduct which traditionally has been undertaken by the profession.
>
> Many of the professional activities that are open to legal challenge may represent sincere efforts to raise standards and protect the public and may not have been designed or specifically intended to suppress competition or enhance anyone's market power. Professor Havighurst has discussed the somewhat delicate juxtaposition of professional and antitrust values which are raised in such circumstances:
>
> ... [A]n assertion that the antitrust laws have been violated does not always call into question the motives of the people involved or attribute to them a conspiratorial intent to suppress competition and to enrich themselves at the consumer's expense. The point may simply be that particular concerted actions,

(footnote continued on following page)

In *Professional Engineers*, the defendants attempted to justify anticompetitive canons of ethics on the basis that they were necessary to protect public health and safety. This Court made it clear that such a defense (accorded respondents in this case) could only be obtained from Congress:

> The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; *United States v. Joint Traffic Assn.*, 171 U.S. 505, 573-577, 19 S.Ct. 25, 33-34, 43 L.Ed. 259. *That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries,* but it is not permitted by the Rule of Reason. As the Court observed in *Standard Oil Co. v. United States*, 221 U.S., at 65, 31 S.Ct., at 517, 'restraints of trade within the purview of the statute . . . [can]not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wis-

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(footnote continued from previous page)

> however well motivated they may have been, are inconsistent with the competitive norm. On this basis alone, they may be declared unlawful. This means that the antitrust laws may be successfully invoked against traditional practices and institutions of the medical profession without impugning the motives either of the profession as a whole or of the dedicated professionals who have sought to improve the profession's performance. That society now seeks a better mode of social control over this industry and invokes the antitrust laws to achieve it requires no apology by either the enforcement agencies or the profession whose traditional practices are questioned. Perhaps these observations will help physicians view antitrust enforcement less as an attack on their profession's integrity than as an attempt to invoke the neutral principles of the free enterprise system as a better answer to real problems than . . . regulatory solutions would be.

I, W. Lazarus, E. Levine, and L. Levin, *Competition Among Health Care Providers* pp. II58-59 (February, 1981) (footnotes omitted) (quoting Havighurst, *The Antitrust Laws, the Federal Trade Commission, and Cost Containment*, 56 Bul. of N.Y. Acad. of Med. 169, 187-88 (1980)).

> dom or want of wisdom of the statute which prohibited their being made.'

435 U. S. at 689-90 (footnotes omitted, insertion in original, emphasis added).[8]

This Court, in *Professional Engineers*, made it clear that, "[t]he test prescribed in *Standard Oil* is whether the challenged contracts or acts 'were unreasonably restrictive of competitive conditions.' " 435 U. S. at 690. "[T]he inquiry is *confined* to a consideration of impact on competitive conditions." *Id.* (emphasis added).

In making its dramatic departure from the Rule of Reason, that only exists in the decision below, the Seventh Circuit ruled that instead of looking only to whether competition was restrained, one must include, within the Rule of Reason analysis, values *independent of competition*. The court stated, "A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds." Pet. App. 34.

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[8] The Court of Appeals for the District of Columbia in *American Medical Ass'n v. United States*, 130 F.2d 233, 248 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) (emphasis added), told respondent AMA that it must look to the legislature before it could engage in anticompetitive behavior:

> But there is a clearly defined line of demarcation here which must be observed if the penalties of the Sherman Act are to be avoided. As we suggested in our earlier opinion, appellants have open to them always the safer and more kindly weapons of legitimate persuasion and reasoned argument, as a means of preserving professional esprit de corps, winning public sentiment to their point of view or securing legislation. But they have no license to commit crime. When they go so far as to impose unreasonable restraints, they become subject to the prohibition of the Sherman Act. This then, represents a limit to professional group activities. If it is desired to extend them beyond this point, legislation is required for that purpose. *It may be desirable that this professional group shall be given such enlarged powers, but if so it will be necessary for the legislature to speak upon the subject rather than for the courts to recognize a privilege based upon preemption or usurpation.*

The court of appeals has thus launched into the morass of having a judge or jury make policy determinations that have traditionally been made by legislatures or expert regulatory agencies. *See, U.S. v. Trenton Potteries,* 273 U.S. 392 (1927).

The sortie into forbidden territory directly contradicts the ruling in *Professional Engineers,* 435 U.S. at 688, 691-92:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. *Instead, it focuses directly on the challenged restraint's impact on competitive conditions.*
>
> . . . .
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> In this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in *Continental T.V., Inc., the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.* 'The true test of legality is whether the restraint imposed is such as merely *regulates and perhaps thereby promotes competition* or whether it is such as may *suppress or even destroy competition.*' 246 U.S., at 238, 38 S.Ct., at 243, quoted in 433 U.S., at 49 n. 15, 197 S.Ct., at 2557.
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> . . . [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; *it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.* (Emphasis added.)

The "independent value" that the Seventh Circuit included within the Rule of Reason analysis was labeled "patient care motive." Pet. App. 33. Accordingly, the court recommended the use of the following instructions, Pet. App. 34-35:

> The jury should be instructed in appropriate language to the following effect: The burden of persuasion is on the

> plaintiffs to show that the effect of Principle 3 and the implementing conduct has been to restrict competition rather than to promote it. If the plaintiffs have met this burden, the burden of persuasion is on the defendants to show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.

However, the respondent medical trade associations have no patients. Thus it is difficult to understand how respondent associations could have a patient care motive for "each person with whom they have entered into a doctor-patient relationship." Pet. App. 34. The only possible reason for incorporating private views on patient care into trade association ethics standards is to bring "others" into conformity—thus presumptively admitting that all medical physicians did not share or practice the private point of view. If they did there would be no reason for the ethics restraint or boycott enforced by the professional societies.

More important, however, the Seventh Circuit's "patient care motive" instructions are contrary to controlling precedent and constitute nothing short of a "health, welfare and safety" defense traveling under an alias. In *Professional Engineers* the defendant sought to justify a restraint on competition caused by its canons of ethics on the basis of public health and safety. This Court held the proferred defense "rests on a fundamental misunderstanding of the Rule of Reason" and stated that the attempt to pass muster under the Rule of Reason "on the basis of the potential threat that competition poses to the public safety and ethics of its profession is nothing less than a frontal

assault on the basic policy of the Sherman Act." 435 U. S. at 681, 695. This Court continued, *id.*, at 695-96.

> The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. *Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute.* In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. *The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.* (Emphasis added.)

In *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F. 2d 476, 484 (4th Cir. 1980), *cert. denied*, 450 U. S. 916 (1981), the district court had held that a medical boycott was justified, in part, because it "enhanced the supervisory process" between M.D.'s and psychologists. The Fourth Circuit reversed, 624 F. 2d at 485, stating:

> Forwarned by the decision in *National Society of Professional Engineers, supra*, that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'

Even more explicitly, in *In re American Medical Ass'n*, 94 F. T. C. 701, 937 Antitrust & Trade Reg. Rep. E-1, E-9 (1979), *aff'd sub nom, American Medical Ass'n v. F. T.C.*, 638 F. 2d 443 (2d Cir. 1980), *aff'd*, 455 U. S. 676 (1982), where certain of the AMA's ethical canons were challenged, it was stated, on the authority of *Professional Engineers*, that, "[e]thical restraints can be justified under the rule of reason, therefore, only if they promote competition, rather than merely other social goals, and if they are not overly broad." *See also, Havoco of America, Ltd. v. Shell Oil Co.*, 626 F. 2d 549, 554 (7th Cir. 1980) ("The Rule

[of Reason] does not exempt restraints which may be argued to be reasonable or expedient but rather focuses on the reasonableness of the affect of the challenged restraint on competition").

Hence, the instant appeals court decision is at logger-heads with decisions of this Court and other courts that have ruled on the issue.

The Seventh Circuit also erroneously relied on and adopted Justice Blackman's[9] "concurring" opinion in *Professional Engineers.* Pet. App. 33. This minority opinion, on its face, was actually a *dissent* on the critical issue and clearly departs from the controlling majority opinion:

> I join Parts I and III of the Court's opinion and concur in the judgment. *I do not join Part II* because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante,* at 1367, and no. 22, *that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act.*
>
> . . . .
>
> My skepticism about going further in this case by shaping the Rule of Reason to such a narrow last *as does the majority,* arises from the fact that there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering. (Emphasis added.)

Professional Engineers, 435 U. S. at 699-700.

This obvious dissent on the basic issue at hand in *Professional Engineers* emphatically underscores the absoluteness of the majority decision and thus the error of the Seventh Circuit in following the minority opinion.

The Seventh Circuit's reliance on footnote 17 of this Court's decision in *Goldfarb v. Virginia State Bar,* 421 U. S. 773, 787 n. 17 (1975), is equally flawed. In that footnote this Court stated, "The public service aspect, and other features of

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[9] Joined by Justice Rehnquist.

the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."

It is an enormous leap from the general statement to a complete reformulation of the Rule of Reason. In any event, in *Professional Engineers,* the Court rejected the notion that the *Goldfarb* footnote allowed health and safety factors to be weighed as part of a Rule of Reason analysis:

> [T]he cautionary footnote in *Goldfarb,* 421 U. S., at 788-789, n. 17, 95 S. Ct. at 2013, quoted *supra,* cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and accordingly, the nature of the competition in such services may vary. *Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.*

Professional Engineers, 435 U. S. at 696 (emphasis added). The meaning of this passage is clear. If professional canons of ethics on balance promote competition they are lawful. If they on balance injure competition, they are unlawful.

It is clear that the Seventh Circuit succumbed to the urge to create judicial exceptions to the Sherman Act that this Court has ruled are reserved to the legislature. Certainly the undesirability of allowing one state licensed health care profession to "eliminate" or "exclude" another, without recourse to the legislature, should give pause to allowing the Seventh Circuit to overrule the well reasoned decisions of this and other courts.

B. The Court of Appeals Ruling That Petitioners Are Not Entitled to a *Per Se* Instruction Upon Retrial Is in Conflict With the Decisions of This Court and Other Courts of Appeal

This Court has frequently held that certain types of agreements are so "pernicious" within the meaning of the Sherman Act as to be declared unreasonable as a matter of law or illegal *per se.* In those cases, proof of an unreasonable affect

on competition is not required. To this effect, the Supreme Court stated in *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1, 5 (1958):

> Certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

It is beyond dispute that group boycotts or concerted refusals to deal have long been included amongst the category of agreements which are *per se* illegal. *Klors', Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *Fashion Originators Guild of America, Inc. v. F.T.C.*, 312 U. S. 457 (1941); *United States v. General Motors Corp.*, 384 U. S. 127 (1966); *Associated Press v. United States*, 326 U. S. 1 (1945).

Recently, in *Arizona v. Maricopa County Medical Soc'y*, 457 U. S. 332, 102 S. Ct. 2466, 2473 n. 15 (1982), the Court stated, "Among the practices which the Courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, *group boycotts* and tying arrangements. *Northern Pac. R. Co. v. U.S.*, 356 U. S. 1, 5 [(1958)]."[10] (Emphasis added.)

In *Maricopa County*, the Court also dispelled the notion that *per se* rules could not be applied to the medical profession in the same manner as to other industries. The defendants argued that *per se* rules did not govern that case "because the agreements at issue ... are among members of a profession [and] are in an industry with which the judiciary has little antitrust experience." *Maricopa County*, 102 S. Ct. at 2472. The Court answered, *id.* at 2476-77:

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[10] The applicability of the *per se* rule to certain kinds of coercive activity was again reiterated in *Assoc. Gen'l Contractors of Cal., Inc. v. Cal. St. Council of Carpenters*, ____ U. S. ____, 103 S. Ct. 897, 903-04 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect").

> We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry.
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> . . . .
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> Finally, the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.' *Northern Pac. R. Co. v. United States, supra,* 356 U.S., at 5, 78 S., Ct. at 518.

Petitioners do not contend that all boycotts are *per se* illegal. Petitioners' position has always been that it is classical horizontal group boycotts intended to eliminate from the market non-group members (i.e., chiropractors) that qualify for *per se* illegality. That position is in keeping with the decisions of this Court, the decisions of other circuit courts of appeal, and even the prior pronouncements of the Seventh Circuit.[11] In *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.,* 665 F. 2d 781, 788 (7th Cir. 1981) (*en banc*), the court stated:

> As *Smith v. Pro-Football, Inc.,* 593 F.2d 1173, 1178 (D.C. Cir. 1978), notes, the common attribute of *per se* illegal boycotts is a 'concerted attempt by a group of competitors

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[11] See, Jost, *The Joint Commission On Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest,* 24 B. C. L. Rev. 835, 908 (1983) ("Moreover, JCAH standards require a form of hospital medical staff organization that is itself exclusionary. Taking into account these coercive elements, per se analysis might be appropriate both for analyzing the effects of JCAH on the competitors of its physician constituency and the competitors of its hospital constituency.")

at one level to protect itself from competition from non-group members who seek to compete at that level."[12]

This formulation of boycotts that are properly *per se* illegal has been accepted by virtually every other circuit court of appeals that has considered the issue. *See, e.g., Larry V. Muko, Inc. v. Southwestern Pa. Bldg. and Construction Trades Council,* 670 F. 2d 421, 429-31 (3rd Cir. 1982), *cert. denied,* 456 U. S. 1005 (1983); *E. A. McQuade Tours, Inc. v. Consolidated Air Tours Manual Comm.,* 467 F. 2d 178, 186-87 (5th Cir. 1972), *cert. denied,* 409 U. S. 1109 (1973); *Com-Tel, Inc. v. DuKane Corp.,* 669 F. 2d 404, 408-09, 412 (6th Cir. 1982); *Worthen Bank & Trust Co. v. National Bankamericard Inc.,* 485 F. 2d 119, 124-25, 127 (8th Cir. 1973), *cert. denied,* 415 U. S. 918 (1974); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F. 2d 71, 76-80 (9th Cir. 1969), *cert. denied,* 346 U. S. 1062 (1970); *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n,* 707 F. 2d 1147, 1160 (10th Cir. 1983), *cert. granted,* 104 S. Ct. 272 (1984); *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.,* 710 F. 2d 752, 772-75, 778-79 (11th Cir. 1983).

Petitioners introduced evidence that they competed with members of the boycotting group and that the intent of the boycott was to eliminate all chiropractors from the market. Petitioners are thus clearly entitled to a *per se* instruction.

Despite the foregoing, the Seventh Circuit erroneously ruled that respondents' conduct could not be *per se* illegal because, *inter alia,* boycotts are *per se* illegal only if they are used to enforce agreements which are themselves *per se* illegal

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[12] In the cited case, *Smith v. Pro-Football,* 593 F. 2d at 1178, the District of Columbia Circuit Court of Appeals stated, "The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members .... *It is the purpose to exclude competition that has characterized the Supreme Court decisions invoking the group boycott per se rule.* (Emphasis added, footnotes omitted.) *Accord, Spray-Rite Service Corp. v. Monsanto Company,* 684 F. 2d 1226, 1236 (7th Cir. 1982), *cert. granted,* 103 S. Ct. 1249 (1983).

—such as price fixing. Pet. App. 23. For this remarkable proposition, the court relied only on *Marrese v. American Academy of Orthopaedic Surgeons,* 706 F. 2d 1488, 1495 (7th Cir. 1983).[13] Rehearing *en banc* was granted in *Marrese,* however, and the cited opinion was, therefore, vacated before the Seventh Circuit issued its Opinion in this case.[14] Moreover, a rule requiring double illegality—a boycott is *per se* illegal only if used to enforce a *per se* illegal agreement—is illogical, the epitome of redundancy, and contrary to all prior law.

The Seventh Circuit also held that because the boycott was not meant to compel certain economic conduct toward consumers that no *per se* rule was applicable. Pet. App. 23. Petitioners are aware of no case which has so held, and the statement is flatly contrary to the landmark group boycott case *Klors', Inc. v. Broadway-Hale Stores, Inc.,* 359 U. S. 207, 210-14 (1959). In that case, a group of manufacturers conspired with a retailer to boycott another retailer. There was not even an allegation of an intent to affect how any retailer dealt with consumers. Yet, the boycott was held to be *per se* illegal. *Klor's,* 359 U. S. at 210-14. *See also, Fashion Originators Guild of America, Inc. v. F.T.C.,* 312 U. S. 457, 463-68 (1941).

Finally, the Seventh Circuit erroneously ruled that the respondents' conduct escaped *per se* condemnation due to the evidence of a possible "patient care motive." This disguised "health, welfare and safety" defense is simply contrary to all

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[13] Judge Doyle also cited *United States Trotting Association* for this proposition as had the court in *Marrese.* There is simply no such holding in the *United States Trotting Association* opinion.

[14] A plurality opinion of the Seventh Circuit has subsequently redecided *Marrese* and once again held that only boycotts intended to enforce agreements which are themselves illegal in and of themselves—such as price fixing—are *per se* illegal. *Marrese v. American Academy of Orthopaedic Surgeons,* Nos. 81-2671, 83-8046 (7th Cir., January 3, 1984). If that contention is correct, then only price fixing and conduct intended to enforce price fixing remains *per se* illegal. The holdings of this Court that certain boycotts are *per se* illegal would be dead letter law.

established law. Further, should it become law, it is inconceivable that any group of competitors, e.g.:

orthopaedic surgeons	v. podiatrists
medical physicians	v. osteopathic physicians
medical physicians	v. nurse practitioners
opthamologists	v. optometrists
psychiatrists	v. psychologists
physiatrists	v. chiropractors
orthopaedic surgeons	v. chiropractors
orthopedists	v. chiropractors
radiologists	v. chiropractors
medical physicians	v. chiropractors

who were caught in a classical horizontal group boycott, would ever testify to other than a "patient care" motive for having engaged in the boycott activity. The legislative authority to determine who shall be allowed to practice and the legislative prerogative to best provide for the public health, welfare and safety, would be submerged as juries responded to the "power" and "prestige" of the privileged, older professions. For that reason, the courts have held that a motive to protect public health and safety does not alter the antitrust analysis and will not do so unless the legislature so provides.

In neither *Professional Engineers* nor *Maricopa County* did arguments of good motives save the defendants from *per se* illegality. Moreover, the Supreme Court stated in *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 44 (1930):

> The prohibitions of the statute cannot 'be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results.' Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 [(1912)].

Accord, Fashion Originators' Guild of America, Inc. v. F.T.C., 312 U. S. 457, 467-68 (1941) (boycott held *per se* illegal despite defendants' claim that the conduct was to protect manufacturers, laborers and consumers from "devastating evils").

Respondents' proferred "good motives" cannot save them from *per se* illegality. If they engaged in a group boycott which

was intended to eliminate or exclude horizontal competitors of some of the group from any market, the agreement is *per se* unlawful. Upon retrial, petitioners are entitled to an instruction on *per se illegality.*

C. The Respondents' Efforts to "Fix" the Fact Finding Report of the HEW Expert Review Panel Are Not Exempt From Antitrust Coverage By the *Noerr-Pennington* Doctrine

There can be little doubt that a conspiracy by competitors to exclude a rival through abuse of regulatory and judicial processes "is inconsistent with free-market principles embodied in the Sherman Act. . . ." *United States v. General Motors Corp.*, 384 U. S. 127, 146 (1966). Such "[p]redation by abuse of governmental procedures," R. Bork, *The Antitrust Paradox* 347 (1978), can never benefit competition and transfers from public to private hands the power to limit competition. *Fashion Originators' Guild of America, Inc. v. F.T.C.*, 312 U. S. 457, 465 (1941).

With the health care industry accounting for 10.5% of the nation's gross national product, or approximately $322 billion, it is particularly sensitive to fraudulent misuse or abuse of expert investigative bodies whose reports are needed by the Executive and Legislative Branches of Government.

The Court of Appeals for the District of Columbia recognized the inherent anticompetitive nature of actions that undermine fact finding determinations. "No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272, 278 (D. C. Cir. 1972).

This Court severely circumscribed *Noerr-Pennington* in *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 510, 512-13 (1972) (emphasis added):

> Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to

exclude a competitor from the market may involve a violation of the antitrust laws, as we held in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 175-177, 86 S.Ct. 347, 349-350, 15 L.Ed.2d 247. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777; Harman v. Valley National Bank, 339 F.2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (CA9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which *leads the factfinder* to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. *But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts.* Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'

Notwithstanding substantial evidence (see supra pp. 9-10) of respondents' "fix" of an Expert Review Panel Report that served as the basis for the HEW Secretary's Report to Congress on the "need" for inclusion of chiropractic services in Medicare, the court of appeals believed that this aberrant conduct was excused by the *Noerr-Pennington* doctrine. Pet. App. 38-39. The court opined that the respondents' actions were excused if "the defendants undertook such efforts to influence govern-

mental bodies with a sincere purpose to obtain the governmental actions that they sought." Pet. App. 39.[15]

From this instruction, buttressed by the supplemental instruction quoted below in footnote 15, it is obvious that the "factfinder" referred to in *California Motor Transport* is met by an absolute bar to consideration of fraud or inequitable conduct that perverted the Fact Finding Body and prevented meaningful access to that group or to HEW which was dependent on the "corrupted" Report.

Certainly there can be no insulation from antitrust accountability for fraud practiced on an expert review panel or agency merely because the perpetrators are sincere in trying to defraud the agency, legislature or other governmental body. For example, certainly those who defraud the Patent Office to obtain a patent monopoly are "sincere" in their efforts to obtain the patent but are not insulated from antitrust consequences for their actions. *Walker Process,* 382 U.S. 172 (discussed in the quote from *California Motor Transport,* supra, p. 27.)

Such fraud and inequitable conduct in this case effectively barred petitioners and their agents from access to the Fact Finding Body or governmental department involved. "Insofar as the administrative or judicial processes are involved, action of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' " *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972).

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[15] The total inappropriateness of this instruction is underscored when read in conjunction with instruction A45 (Respondents' *uu*) also given by the trial court:

> *Regardless of the means which may have been employed by any of these defendants* to influence state or federal legislation or to advocate their position to government agencies or officials, it is not a violation of the antitrust laws if the defendants employing these means actually wanted the government agency or official to take action which might adversely affect or injure chiropractors.

Pet. App. 60 (emphasis added). It should be obvious that the appeals court has totally misconstrued *California Motor Transport.*

The court of appeals' ruling is simply unsuitable for the insidious, covert actions of respondents in undermining petitioners' access to the Fact Finding Body, HEW, and the Congress.

VII. CONCLUSION

The appeals court opinions grant quasi-governmental authority to unelected medical professional societies and trade associations to conspire[16] to restrain competition with state licensed chiropractors operating within the scope of their state licenses and to exclude chiropractors from otherwise legal markets where competition would normally take place.

The opinions set forth rules of law that are in direct conflict with prior decisions of this Court and with other circuits.

The Petition For Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE P. MCANDREWS
(Counsel of Record)
TIMOTHY J. MALLOY
ROBERT C. RYAN
ALLEGRETTI, NEWITT, WITCOFF
& MCANDREWS, LTD.
125 South Wacker Drive
Chicago, Illinois 60606
(312) 372-2160

PAUL E. SLATER
SPERLING, SLATER & SPITZ
55 West Monroe Street
Chicago, Illinois 60603
(312) 641-3200
Attorneys for Petitioners

February 28, 1984

[16] Said the court of appeals, Pet. App. 51:

Based on the pleadings, on all the motions which had previously been filed (including motions for summary judgment), and on 'everything that the court has considered in this case,' the district court determined that there was evidence that there had been 'a conspiracy among all of the defendants,' and that this evidence was sufficient to permit use against all of the defendants of statements made by any of them in furtherance of the conspiracy.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1331

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA A. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.,

Plaintiffs-Appellants,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., JAMES H. SAMMONS, M.D.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 3777—Nicholas J. Bua, *Judge.*

ARGUED JANUARY 20, 1982—DECIDED SEPTEMBER 19, 1983

Before SWYGERT, *Senior Circuit Judge,* SPRECHER,* *Circuit Judge,* and DOYLE, *Senior District Judge.***

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* Judge Sprecher heard oral argument and participated in the conference which followed. He died May 15, 1982, and did not participate in the preparation or approval of this opinion.

** James E. Doyle, a Senior United States District Judge for the Western District of Wisconsin, is sitting by designation.

DOYLE, *Senior District Judge.* Plaintiffs appeal from a judgment entered on a jury verdict in favor of defendants-appellees. Plaintiffs, five licensed chiropractors, charged defendants-appellees[1] with violating sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1979).[2] Plaintiffs alleged that defendants engaged in a combination and conspiracy to eliminate the chiropractic profession through refusing to deal with plaintiffs and other chiropractors. Plaintiffs alleged defendants implemented the group boycott by agreeing to induce individual medical doctors to forego any form of professional, research, or educational association with chiropractors, to induce hospital and other health care facilities to deny access to chiropractors, and to induce actual and prospective patients of chiropractors to avoid seeking chiropractic services. Plaintiffs also alleged that through this agreement, defendants attempted to monopolize and conspired to monopolize certain health care markets.[3]

---

[1] Two defendant medical organizations settled prior to trial and thus were not parties to the judgment. Plaintiffs have not appealed from the judgment in favor of one defendant, the Chicago Medical Society. Plaintiffs' complaint named individual members of the defendant associations as co-conspirators but not as defendants.

[2] Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . ., or conspiracy in restraint of trade or commerce . . . ." 15 U.S.C. §1 (1970). Section 2 prescribes penalties for "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . ." 15 U.S.C. §2 (1970).

[3] On appeal, plaintiffs raise no claim based solely on §2. They assert conclusorily that the trial court erred with regard to those claims in its jury instructions on conspiracy, its failure to instruct the jury that good motives do not constitute a defense to either §1 or §2 violations, and its admission of evidence on defendants' public health and welfare motives. They do not present specific argument on these issues. Since we treat each of these points in light of plaintiffs' §1 claims, and since plaintiffs failed to raise the §2 claims in any meaningful fashion on appeal, we do not address separately their general assertion of claims based solely on §2.

I. *GROUNDS OF APPEAL*

Plaintiffs' principal ground of appeal is that the court's instructions gave the jury to understand, incorrectly, that a boycott by defendants, resulting in a diminution of competition between chiropractors and medical doctors, was lawful if the boycott was the product of a genuine belief by medical doctors that chiropractic is dangerous quackery. Because the district court embraced this incorrect view of the law, plaintiffs contend, it received in evidence, erroneously and over objection, much prejudicial material concerning the alleged evils of chiropractic. Plaintiffs contend also that the jury was incorrectly instructed on the application of the first amendment in the circumstances.

The remaining grounds of appeal relate to: jury instructions on coercive enforcement of ethical canons as an essential element of a conspiracy of the type alleged; jury instructions relating to apparent authority of agents; the trial court's handling of the "unclean hands" concept; and the trial court's refusal to permit reopened discovery into settlement negotiations.

Defendants-appellees dispute all of these contentions, of course. Five of the organization defendants (JCAH, AHA, ACP, ACS, and ISMS) raise a further argument. Each claims that its motion for a directed verdict was erroneously denied by the district court. Each asserts that the evidence was insufficient to support a jury finding that it was a member of a conspiracy. Thus, each contends, the judgment they won should be affirmed even if the judgment in favor of the other defendants were to be reversed on one ground or another.

In the following section headed "Facts," we set forth those propositions which a reasonable jury might have found as fact and which might arguably have prompted a verdict in plaintiffs' favor, had the jury been instructed as plaintiffs contend it should have been and had the jury been protected from the allegedly prejudicial evidence. We set forth, also, those facts concerning the involvement of JCAH, AHA, ACP, ACS, and ISMS in the alleged con-

spiracy which a reasonable jury might have found from the evidence, viewed most favorably to the plaintiffs.

II. *FACTS*

The American Medical Association (AMA) is a nonprofit corporation with a membership of over 200,000 medical doctors, which is nearly half the total number of medical doctors in the United States. AMA is a federation of independent state and territorial medical societies, each of which appoints representatives to the House of Delegates of the national organization. The House of Delegates elects the AMA Board of Trustees. AMA is heavily involved in this country's professional and public medical education programs. AMA also publishes numerous professional journals, receives and responds to questions from the public on medical subjects, and engages in legislative lobbying. AMA promulgates the Principles of Medical Ethics, which are interpreted by its Judicial Council.

The American Hospital Association (AHA) is a nonprofit corporation composed of 7,000 organization members and 30,000 individual members. Approximately 6,000 of the 7,000 hospitals in the United States belong to AHA. AHA publishes several periodicals and manuals on various topics related to hospital operations. It also collects statistics on hospitals, sponsors educational programs, and reviews and responds to governmental activities relevant to hospital operations.

The American College of Surgeons (ACS) is a nonprofit corporation having as its members about 40,000 of the 100,000 American physicians who identify themselves as surgeons. ACS takes public positions on relevant issues and sometimes expresses those positions to legislative and administrative bodies.

The American College of Physicians (ACP) is a nonprofit corporation composed mainly of physicians who specialize in internal medicine. Its chief function is to conduct continuing education programs for members and nonmembers.

The Joint Committee on Accreditation of Hospitals (JCAH) is a nonprofit corporation having AMA, AHA, ACS, ACP, and the American Dental Association as its members. The member organizations appoint representatives to the JCAH Board of Commissioners, the policy-making body of JCAH. JCAH operates a health care facilities accreditation program, in which it establishes standards for accreditation and conducts surveys of individual institutions when they so request. If a facility meets JCAH standards, that facility is accredited.

The American College of Radiology (ACR) is a nonprofit corporation with approximately 13,000 members, most of whom are medical doctors specializing in radiology. It is active in education and research, and it furnishes advice and information to government, private industry, and health care professionals concerning radiation protection and the practice of radiology.

The American Academy of Orthopaedic Surgeons (AAOS) is a nonprofit corporation composed of about 9,000 medical doctors who specialize in orthopaedic surgery. More than 75 percent of the total number of board-certified orthopaedic surgeons in the United States belong to AAOS. AAOS conducts continuing medical education courses for practicing orthopaedic surgeons and persons working in related areas, including orthopaedic nursing, occupational therapy, physical therapy, and manufacturing braces and artificial limbs.

The Illinois State Medical Society (ISMS) is a state medical society with approximately 14,000 medical doctors as members. ISMS is one of the fifty state medical societies that comprise AMA.

Doyl Taylor was employed by AMA and served as director of the AMA Department of Investigation and as secretary to the AMA Committee on Quackery. Joseph A. Sabatier, Jr., M.D., and H. Thomas Ballantine, Jr., M.D., both served on the AMA Committee on Quackery as members and chairmen. James H. Sammons, M.D., was a member of the AMA Board of Trustees.

Chiropractic is a health care service. Its primary therapeutic tool is spinal manipulation.[4] Chiropractors and medical doctors treat some of the same medical problems. Chiropractors would treat some patients in health care facilities and would use hospital X-ray and laboratory services if such treatment and use were permitted.

In Illinois, Michigan, California, Colorado, and Missouri, five states where plaintiffs have practiced, there were no laws in effect during the time relevant to this lawsuit that prohibited chiropractors from furnishing care in a hospital under the supervision of a medical staff member, nor were there laws preventing hospitals from providing X-ray or laboratory services to chiropractors or preventing hospital X-ray departments or radiologists from making X-ray films or copies of X-rays available to chiropractors at the request of their patients.

Principle 3 of the AMA Principles of Medical Ethics in effect during the alleged boycott provided: "A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily professionally associate with anyone who violates this principle."

At its meeting on November 2 and 3, 1963, the AMA Board of Trustees voted to establish a "Committee on Quackery" (Committee). The Committee was active from that time until 1974. It considered "its prime mission to be, first, the containment of chiropractic and ultimately, the elimination of chiropractic." Memorandum to AMA Board of Trustees from Committee on Quackery, January 4, 1971. During these years, the AMA also operated a Department of Investigation (Department), a clearing-house for information on healing methods AMA deemed unscientific.

In December of 1966, upon the recommendation of the Committee and the AMA Board of Trustees, the AMA House of Delegates adopted a resolution asserting: "It is

[4] Spinal manipulation also is practiced by osteopathic physicians, physical therapists, and a small number of medical doctors.

the position of the medical profession that chiropractic is an unscientific cult whose practitioners lack the necessary training and background to diagnose and treat human disease." This resolution, together with Section 3 of the Principles of Medical Ethics, was incorporated into the Opinions and Reports of the Judicial Council.

The Committee characterized this policy statement as follows:

> This was the necessary tool with which your Committee has been able to widen the base of its chiropractic campaign. With it, other health-related groups were asked and did adopt the AMA policy statement or individually-phrased versions of it. These, in turn led to even wider acceptance of the AMA position.
>
> . . . .
>
> The hoped-for effect of this widened base of support was and is to minimize the chiropractic argument that the campaign is simply one of economics, dictated and manipulated by the AMA.

Memorandum, *supra*, at 2.[8]

The Committee and the Department prepared numerous publications critical of chiropractic for distribution to medical professionals and laypersons. The Committee was extensively involved in legislative work at state and national levels on such matters as chiropractic licensing and Medicaid and Medicare reimbursement for chiropractic services. Among its other activities were sending letters warning medical boards and associations that professional cooperation and association between chiroprac-

[8] This memorandum was characterized as a report of the Committee's activities during the previous seven years.

The memorandum said: "The Committee has not submitted such a report [earlier] because it believes that to make public some of its activities would have been and continues to be unwise. Thus this report is intended only for the information of the Board of Trustees."

tors and physicians were unethical and attempting to discourage colleges, universities, and faculty members from cooperating with chiropractic schools.

Codefendant organizations AHA, ACS, ACP, JCAH, ACR, AAOS, and ISMS communicated in various ways with defendant AMA and its Committee on Quackery. Some codefendant staff members attended meetings and a conference of chiropractic sponsored by the Committee. Codefendant staff members also discussed with Committee members ways of responding to inquiries from individual physicians and hospitals concerning possible professional cooperation with chiropractors. Representatives of three codefendant associations joined with AMA to form defendant JCAH and to determine requirements for JCAH accreditation. The JCAH accreditation manual asserted that a hospital permitting chiropractors to use its facilities would "very probably" lose its accreditation. Some codefendant organizations adopted the AMA Principles of Medical Ethics, including Principle 3.

Through such mechanisms, individual physicians were discouraged from cooperating with chiropractors in: patient treatment, because referrals were inhibited by defendants' activities; research; and educational activities, such as sharing clinical experience and research results. Chiropractors were denied access to the hospital facilities they considered necessary to practice their professions. Medical doctors were discouraged from aiding chiropractors in interpreting electrocardiograms. Requests by individual plaintiffs to use laboratory and X-ray facilities were not granted; requests for hospital in-patient privileges were similarly denied. Referrals from medical doctors were reduced. Public demand for chiropractic services was negatively affected.

JCAH. JCAH was comprised of twenty-one members, seven appointed by AMA, seven by AHA, three by ACS, three by ACP, and one by the American Dental Association. JCAH exercised considerable power over hospitals through the mechanism of accreditation. JCAH staff members replied to letters from hospitals on chiroprac-

tors by asserting that a hospital permitting chiropractors to use its services, such as laboratory testing and X-rays, would endanger its status as an accredited institution, even if a state passed a law requiring hospitals to allow chiropractors to be staff members. These letters at times referred to the AMA Principles of Medical Ethics and to an AMA publication on chiropractic. JCAH jointly published with AHA a widely distributed manual, *Hospital Accreditation References*, setting forth standards and criteria for JCAH accreditation. The manual was written by the director of JCAH. The manual contained the following statements: "The Commission looks on chiropractors as cultists. A hospital that encourages cultists to use its facilities in any way would very probably be severely criticized and lose its accreditation." The same statements appeared in a column written by the JCAH director, published in the Journal of the American Hospital Association. In its Accreditation Manual for Hospitals JCAH incorporated the AMA Principles of Medical Ethics, and asserted: "Failure by the medical staff and the governing body to take all reasonable steps to ensure adherence to these ethical principles shall constitute grounds for nonaccreditation." In denying plaintiff Lumsden staff privileges, one hospital cited its unwillingness to jeopardize its JCAH accreditation.

AHA. AHA appointed commissioners to JCAH. AHA and JCAH collaborated to publish *Hospital Accreditation References*. AHA also published that material in the AHA professional journal. Dr. Shu, an AHA employee who responded on behalf of AHA to inquiries from individual hospitals concerning use of facilities by chiropractors, answered those inquiries by citing the JCAH view that accreditation would be jeopardized if such use were permitted. At the AMA "National Conference on Health Quackery—Chiropractic," Dr. Shu attended a presentation of the "right and duty" of hospitals to exclude chiropractors. He also met informally with AMA and JCAH employees to discuss ways of answering questions from hospitals concerning chiropractors. Persons attending this meeting discussed the

ethical prohibition on physicians' association with chiropractors. Dr. Shu had telephone conversations with AMA and JCAH personnel on the subject of chiropractors using hospital facilities.

ACP. ACP appointed commissioners to JCAH. Minutes from an ACP board of governors meeting in 1978 described activities of the ACP's "Ad Hoc Committee on Chiropractic."[6] The committee was named "to suggest what might be done at the Chapter or regional level to promote the College's policy toward chiropractic." Although part of the committee's purpose was simply to inform ACP members of pending lawsuits by chiropractors against ACP, the committee also recommended that:

> the Governors should remain alert to efforts of chiropractors to gain access to radiographic and clinical laboratory diagnostic facilities in their regions and keep ACP headquarters informed of such developments;
>
> the Governors should alert colleagues in other disciplines to the efforts of chiropractors to gain access to radiographic and clinical pathology diagnostic facilities; and
>
> the Governors and the College members in their regions should discuss these matters with their county and state medical societies and with their representatives to the House of Delegates of the AMA.

The ACP board of governors unanimously voted to approve the committee's report and to distribute it immediately.

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[6] Defendant ACP argues that the trial court erred in admitting this exhibit, or alternatively, that the exhibit could not be the basis of an antitrust violation, because the activities it described were protected by the *Noerr-Pennington* doctrine. Some of the committee's recommendations were directed toward protected activities. But others were not. That some activities of a particular organization are protected by the first amendment does not shield all its activities, under *Noerr-Pennington*.

ACS. ACS appointed three commissioners to JCAH. The ACS "Statement on principles" endorsed the Principles of Medical Ethics and suggested that infraction of those principles would result in disciplinary action by ACS. An ACS director attended the National Conference on Health Quackery sponsored by the AMA Committee on Quackery. A former ACS director responded to a request from a state medical society for the ACS position on the relationship between physicians and chiropractors by asserting: "The College has never taken an official position in regard to relationships between M.D.s and chiropractors. We have followed the lead of the AMA, which is not always entirely clear." The letter notes that this director called the AMA legal department for an answer to the inquiry, and the letter suggests the AMA be consulted for an "authoritative" opinion.

ISMS. ISMS adopted the Principles of Medical Ethics, and ISMS members are bound by the principles. ISMS appointed its own Committee on Quackery. AMA Committee on Quackery staff member Doyl Taylor spoke to the ISMS committee on AMA activities and formal positions concerning chiropractic. ISMS committee members attended an AMA-sponsored meeting on quackery at which chiropractic was a major item of discussion. The ISMS committee endorsed the AMA House of Delegates statement labeling chiropractic an "unscientific cult." The ISMS Board of Trustees subsequently adopted this statement. The ISMS Board of Trustees had jurisdiction over all ethical questions. Doyl Taylor wrote the chair of the ISMS Committee on Quackery to suggest various meetings, referring to ISMS as "an active partner in the fight to head off chiropractic." The "Policy Manual of the Illinois State Medical Society," May, 1967, included the following statement: "The Judicial Council of the American Medical Association has ruled that it is unethical to associate VOLUNTARILY with an individual who practices as a member of a 'cult.'" (emphasis in original) In 1975, the AMA named Dr. Lees, former chairman of the ISMS Board of Trustees, to the AMA Committee on Quackery. A letter written by an

ISMS staff member in 1966, complained to Doyl Taylor about the AMA position on chiropractic, but took no action to dissociate itself from that position.

III. *OPINION*

Plaintiffs alleged and undertook to prove that each of the defendants-appellants had done certain things at certain times, with the result that chiropractors' ability to compete with medical doctors for patient fees had been impaired. In their affirmative case, plaintiffs presented themselves and chiropractors generally as serious, unpretentious, governmentally-licensed practitioners in competition with medical doctors only within the narrow band of health services to which chiropractors limited themselves. Plaintiffs presented evidence intended to prove when and how the defendants came to a decision to trim and eventually perforate chiropractors' sails and when and how they chose and employed the means to that end. This evidence came largely from various officers and employees of the defendant organizations, called adversely, and from documents obtained from defendants' files. There was no way in which it could have been presented without revealing the low opinion of chiropractic entertained by medical doctors generally and the reasons for that opinion as stated from time to time by the medical doctors.

In plaintiffs' view of the Sherman Act, it was irrelevant whether the stated reasons, namely, ethical considerations springing from belief that chiropractic is dangerous quackery, were the true reasons or whether the true reasons were economic. But nothing was to be lost by plaintiffs, so far as the jury was concerned, by innuendo that money and not ethics spurred on the medical doctors.

In mild degree, there was dispute whether particular defendants had done the things plaintiffs alleged; in higher degree, whether there was competition between chiropractors and medical doctors; and in yet higher degree, whether defendants' conduct had in fact im-

paired chiropractors' ability to compete.[7] But in the district court, before and during trial, defendants were insistent that under the Sherman Act, available defenses were that their conduct had been undertaken in the interest of public health, safety, and welfare and that their conduct had been non-commercial. The trial was dominated by defendants' efforts to persuade the jury that they had acted in the good faith belief that chiropractic is dangerous quackery. Evidence intended to show that chiropractic is indeed dangerous quackery was introduced to support the proposition that defendants' belief was genuine.

The upshot of all this was that much of the trial, and virtually all of the parties' arguments to the jury were a free-for-all between chiropractors and medical doctors, in which the scientific legitimacy of chiropractic was hotly debated and the comparative intensity of the avarice of the adversaries was explored.

During the pretrial stages and the trial, the able and experienced district judge suffered from the uncertainty which marks the law of boycotts by professionals: specifically, what legal justification, if any, exists for such boycotts when their effect is to restrain competition. From time to time, understandably, he described this core issue as "unique," "new waters," and "close." On the eve of trial, he embraced plaintiffs' contention that it was irrelevant whether defendants' conduct had been undertaken in the interest of public health, safety and welfare (the "public interest defense") and whether that conduct had been non-commercial, and he struck those attempted affirmative defenses. He agreed that a trial on the validity of chiropractic should not be allowed to develop; that it was for legislatures and not defendants to decide whether

[7] In part II, above, we have set forth those facts concerning what defendants actually did and with what effect, that a reasonable jury could have found from the evidence when viewed most favorably to plaintiffs. In all that follows, we will assume that the jury did make such findings. In this manner, the significance of error in the conduct of the trial, if any, can be tested.

chiropractic should be permitted to exist; and that even if defendants could prove that their sole motivation was a sincere and well founded belief in the dangers of chiropractic, they could not escape liability for an otherwise unlawful boycott. But simultaneously he denied a broad motion by plaintiffs, *in limine*, to exclude evidence bearing on public health, safety or welfare. He expressed the opinion that evidence pertaining to defendants' "public interest" beliefs might bear on how to view and weigh evidence that defendants did or did not conspire; that such evidence might be necessary to determine whether a *per se* violation of the Sherman Act had occurred; and, if significant in amount, such evidence might be relevant to rule of reason analysis. He also observed that such evidence would necessarily bear on the nature and availability of the equitable relief plaintiffs were seeking (in addition to money damages). So he decided that defendants' "public interest" evidence should be allowed "if it is shown that such evidence is relevant, probative, and not cumulative." From the moment of their opening statements on through the trial, defendants pressed for the admission of their "public interest" evidence and over repeated objection the district court received it.

Whether the district judge enjoyed discretion to receive or not to receive this evidence is a question we will address in a moment. However, it is obvious that because it was received in such abundance, the significance of the jury instructions and the form of the verdict was sharply enhanced.

Although the verdict form requested by plaintiffs, acquiesced in by defendants, and used by the district court was "special" in the sense that the questions of causation and of the amount of the damages were separated from the other questions, it was general in that question 1 was simply whether each defendant "conspired to restrain trade within the meaning of Section 1 of the Sherman Act" (and question 2, whether each defendant conspired to monopolize or attempted to monopolize within the meaning of Section 2). That is, the liability issue (apart

from the question of causation) was not broken down into a series of questions, from the answers to which the judge might have determined the judgment. Thus the district court found it necessary, in a bundle of instructions, to explain to the jury its duty, for example, first to address whether there had been a *per se* violation and, only if the jury decided that question negatively, then to address whether there had been a violation under the rule of reason.

We commend the use of more precise questions in an antitrust case of this kind.

Once the decision had been made to permit the jury to entertain the *per se* theory, it would surely have been helpful to the jury had the special verdict form embodied a set of fact questions bearing on the *per se* rule and another set bearing on the rule of reason, with a portion of the instructions expressly directed to the *per se* questions, and with an explanation in the verdict form itself that the jury's answers to the *per se* questions would determine whether the jury would be required to answer the rule of reason questions. If so required, the jury could have been told to answer them in the light of another portion of the instructions relating expressly to the rule of reason.

We do not consider it error to have submitted the case in the form of a single all-inclusive question on Section 1 of the Act. But because it was submitted in this manner, we are obliged to examine the instructions with particular care to determine whether they explained the law not only correctly, but reasonably understandably.

A. *Jury Instructions*

The case presents difficulties, both theoretical and what may be called forensic or rhetorical. It was important that the court's instructions help the jury through both sets of difficulties.

On the theoretical side, the "boycott" which plaintiffs alleged and undertook to prove is surely not within any of

the more familiar contexts. However, "[b]oycotts are not a unitary phenomenon." P. Areeda, *Antitrust Analysis* 381 (2d ed. 1974). "In its simplest aspects, a boycott . . . is nothing more than an agreement among a number of economic actors to sever or limit economic relations with another economic actor or actors." Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 Duke L. J. 247, 248.

Here, the jury was free to find that the services of one medical doctor were interchangeable with the services of other medical doctors; they competed with one another. The services of one chiropractor were interchangeable with the services of other chiropractors; they competed with one another. The services of a relatively small number of medical doctors were interchangeable with the services of all or nearly all chiropractors; they competed with one another. Superficially at least, the benefits to consumers arising from unrestrained competition could have been realized without any cooperation between any two medical doctors, between any two chiropractors, between any medical doctor and any chiropractor, or between an enclave of medical doctors and an enclave of chiropractors. The medical doctors, generally, were more than content with the absence of cooperation between two enclaves; the plaintiffs and chiropractors, generally, were not. The chiropractors contend that they would have gained economically had medical doctors referred patients to them, which seems accurate. The chiropractors seem also to contend that they would have gained economically had medical doctors accepted referrals from them, with the professional courtesies of exchanging reports and opinions, so as to permit the chiropractors better to serve their patients; this seems accurate because in the long run more persons will seek out chiropractors if chiropractic services are perceived to be beneficial. The chiropractors contend that those medical doctors who controlled the defendant medical associations influenced their colleagues to keep the medical doctor enclave intact.

The chiropractors contend that they would have gained economically had there been available to them: hospital

facilities, laboratory facilities, X-ray-taking facilities, and the services of radiologists trained in reading X-rays. The chiropractors seem to contend that these facilities and resources were not available to them within their own enclave; that these facilities and resources are to be viewed as standing free of both enclaves; and that it is the members of the medical doctor enclave who caused these otherwise independent facilities and resources to be unavailable to the chiropractors, to the economic disadvantage of the latter.

This is not a case in which it is alleged or shown that the medical doctors, competitors of one another, have combined, for example, to fix the prices they will receive from consumers, and that they have agreed to ostracize or boycott those among them who fail to go along. It is not a case in which the medical doctors are alleged to have combined to boycott chiropractors in an attempt to coerce the chiropractors to behave in a certain economic manner, such as pricing.

What the antitrust law implications of all this may be for consumers of health care services, as distinguished from chiropractors as a group of health care providers, is difficult to discern. *See Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1495-1496 (7th Cir. 1983). In any event, in the absence of partial or plenary summary judgment or directions of verdict, they are implications which arise from facts which it was for the jury to have found, combined with law which it was for the judge to have explained in the instructions.

On the forensic or rhetorical side, as we have already observed, the opening statements, the evidence, and the closing arguments which the jury had heard and seen must have come through as if the jury was being called upon to decide whether in our society it is the medical doctors who are the heroes and the chiropractors the villains, or vice versa.

It is familiar law that we must look to the instructions as a whole, in a common sense manner, avoiding fastidiousness, inquiring whether the correct message

was conveyed to the jury reasonably well. Even if we should discern error in one or more instructions, we will not reverse a judgment—especially after eight weeks of trial—unless we are persuaded the jury's understanding of the issues was seriously affected, to the prejudice of the plaintiffs. *See, e.g., Beard v. Mitchell*, 604 F.2d 485, 498 (7th Cir. 1979).

We are persuaded that from the evidence, the statements of counsel, and the court's instructions, several basic points must have been well understood by the jury. The jury very likely understood that it was called upon to decide whether each of the defendants had agreed with others that the medical doctors would not refer patients to chiropractors and would not themselves consult or cooperate with chiropractors, and that hospitals and X-ray facilities would be placed off limits to chiropractors. If the jury made this finding, it very likely found as well that the boycotters: acted voluntarily and intended to do these things; intended the natural consequence that significantly fewer persons would consult chiropractors about certain health problems, such as back and neck pains; and were not displeased by the anticipation of this consequence.

But what this jury needed badly to know was whether "within the meaning of Section 1" it made a difference why the defendants had behaved in this intentional manner with this intended consequence. The jury could certainly have found that defendants had behaved in this manner: (1) because they believed that it would permit them to make more money than they would make if they did not do it; or (2) because they believed they were performing a public service in applying economic pressure to diminish or eliminate the general threat posed by chiropractic to public health, safety and welfare; or (3) because defendants respected scientific method as the basis for diagnosis and treatment and were unwilling to risk the health and lives of their patients by associating professionally in the care of patients with persons who (so defendants thought) do not share respect for scientific method; or (4) because of some combination of (1), (2) and

(3). For brevity and convenience, we will refer to (1) as a money motive, (2) as a public interest motive, and (3) as a patient care motive.

The jury needed to know whether it should answer the verdict question yes or no if it found that a defendant's motive had been money alone, public interest alone, or patient care alone. It needed to know whether to answer yes or no if it found that a defendant had entertained two or all three motives, and, if so, whether it is legally significant that one motive was more powerful than another.

1. *Per se instructions*

Over defendants' objection, the court granted plaintiffs' request that the jury be permitted to decide whether there had been a *per se* violation of Section 1 and, if not, then to apply the rule of reason in determining whether a violation had occurred. We have sustained a judgment for a plaintiff based upon a verdict by a jury which was permitted to proceed in this manner. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 827 (7th Cir. 1978), *cert. denied* 440 U.S. 930 (1979). However, before the jury is freed to find a *per se* violation, the trial court must determine that there is evidence from which the jury may find that the defendants engaged in certain conduct—for example, a horizontal agreement among competitors to fix prices charged to consumers—which conduct, the court (not the jury) must decide, constitutes a *per se* violation. In such a case, it must be explained to the jury that its function is to decide whether certain conduct, described with precision in the instruction, did or did not occur. It must be explained, also, that if the jury finds that the described conduct did occur, it must also find, without further factual inquiry, that section 1 was violated. In this important respect, the verdict as to a *per se* violation must be controlled by the court.

We will assume for a moment that in the present case there was evidence of conduct which constituted a *per se*

violation of section 1 and, on that assumption, inquire whether the jury was properly instructed as to its function.

The jury was instructed that:

(1) To establish *per se* unlawfulness, plaintiffs were obliged to show: (a) that defendants entered into "a concerted refusal to deal, engaged in by the participants primarily or in large part for the purpose of excluding competitors from the market"; and (b) "that the primary motivations for this refusal to deal were essentially commercial or economic in nature."

(2) Not all concerted refusals to deal are group boycotts of the kind the law deems *per se* unlawful. Those "that are of a noncommercial nature or character, ones that do not include among their principal aims the economic purpose of excluding competitors, may be lawful or unlawful depending on their reasonableness."

(3) "[I]f you find that any of the boycott conspiracies which plaintiffs have alleged were entered into to contain or eliminate chiropractors or to injure them in their ability to compete, . . . you may not consider whether the resulting restraint of trade was reasonable or unreasonable. Conspiracies are illegal. However, if you find that the conspiracies existed, but not for the specific purpose of excluding chiropractors from the market or injuring them in their ability to compete, then you must determine whether the agreements imposed an unreasonable restraint on trade."[9]

[9] "Conspiracies are illegal" is taken from the reporter's transcript of the instructions as read by the trial judge. It is clear from the joint appendix that the judge intended to say: "The conspiracies are illegal." Whether the error was his or the reporter's, we are sure that the jury understood the reference to be to the kind of conspiracies described in the immediately preceding sentence.

The third of these instructions, including the use of the word "purpose" rather than "intent," resembles closely an instruction requested by the plaintiffs themselves, but the first and second were inconsistent with plaintiffs' requests.

Still assuming that from the evidence the jury could have distilled conduct on the part of one or more of the defendants which did indeed constitute a *per se* violation, the instructions were faulty in two major respects. First, unfairly to the defendants, the instruction failed to describe with sufficient precision the conduct which, if the jury found it to have occurred, constituted a *per se* violation. Second, unfairly to the plaintiffs, the instruction created a strong impression that conduct which would otherwise constitute a *per se* violation escapes that categorization if the "public interest motive" was the "primary" or "principal" motive.

As to the first point, the active role imposed upon the trial judge with respect to the concept of *per se* violations demanded that the jury be instructed that only if it found that a particular defendant had done A, B, C, and D, could it proceed to find that such conduct constituted a *per se* violation. But the only descriptions provided this jury were "a concerted refusal to deal" and "any of the boycott conspiracies which plaintiffs have alleged." We appreciate that elsewhere in the instructions, the elements of the alleged concerted refusal to deal were described (for example, refusal to refer patients, denial of access to hospitals, closing doors of educational programs). But the *per se* rule is extraordinarily severe and it was necessary for the jury to know whether it became operative only if the jury found that a particular defendant participated in all of the alleged misconduct or if it found participation in some but not all of the alleged misconduct. No guidance was provided in this respect.

As to the second point, taken together and taken in the context of all of the instructions, the jury was plainly led to believe that if the money motive was present but was not "primary" or "principal," even the most classical anti-

competitive conduct would not constitute a *per se* violation. The jury may well have found that a generalized public interest motive was dominant with one defendant or another. If so, the jury was required by the instructions to withhold the *per se* violation label even from conduct—comparable to horizontal price-fixing, for example—to which the label would otherwise clearly attach. This was error. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

It can fairly be said that the Supreme Court of the United States has been persistent and firm in its support of the *per se* doctrine. Since the trial of the case before us, the Court has pointedly described and endorsed its virtues. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. at 342-348. Also, it is now firmly established that the members of learned professions and their professional associations are within the terms of Section 1 of the Sherman Act. *Id.* at 348-349; *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). Nor are the duration and depth of the judiciary's experience with the health care industry too little to permit application of the *per se* rule to a particular device, such as price-fixing, the anticompetitive effects of which have long been recognized. *Arizona v. Maricopa County Medical Soc.*, 457 U.S. at 349-351. Moreover, as recently as in *Arizona v. Maricopa County Medical Soc.*, a price-fixing case, the Court quoted approvingly this language from *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958): "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." 457 U.S. at 344, n. 15.

Nevertheless, we conclude that in the present case, the trial court should not have acceded, over defendants' objection, to plaintiffs' request that the jury be afforded the option to find a *per se* violation. It follows that any error in the *per se* instructions which was disadvantageous to plaintiffs was not prejudicial.

We reach this conclusion because we reject the assumption, in which we have indulged for the purpose of analysis, that facts could have been distilled by the jury, from this record which would constitute a *per se* violation, and because the evidence of the "patient care motive" required that rule of reason analysis be applied.

This court has recently recognized in *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-90 (7th Cir. 1981) (*en banc*), "that boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price-fixing agreements." *Marrese v. American Academy*, 706 F.2d at 1495. As we have observed, one of the peculiarities of the boycott which plaintiffs alleged and undertook to prove was that it was not used to compel either medical doctors or chiropractors to engage in certain economic behavior vis-a-vis consumers, such as price-fixing. The evidence was that the compulsion to be exerted upon medical doctors, hospitals, X-ray facilities, and laboratories through the conspiracy, if the jury found there was such intended compulsion, was to engage in the boycott itself, and not to exert, through the boycott, compulsion upon any one to do or to refrain from doing anything else. Particularly when a conspiracy of this sort is alleged in the context of a profession, the nature and extent of its anticompetitive effect are too uncertain to be amenable to *per se* treatment, as contrasted with treatment under the rule of reason.

Moreover, assuming the case were otherwise amenable to *per se* treatment, the presence of substantial evidence of motive (3)—the "patient care" motive— rendered the case inappropriate for *per se* treatment. In discussing the instructions on the rule of reason, we will comment further on the legal significance of the patient care motive. For the present, we note that in *Goldfarb*, 421 U.S. at 788, n. 17, *National Society of Professional Engineers v. United States*, 435 U.S. at 696 (1978), and *Arizona v. Maricopa County Medical Soc.*, 457 U.S. at 348-349, the Court has taken pains to preserve the possibility that a particular practice which could be viewed as a

violation of the Sherman Act in another context, should be viewed and treated differently in the circumstances peculiar to a learned profession. We know from *Professional Engineers* and *Maricopa County* that an agreement to fix prices will not escape *per se* treatment simply because it is entered into by professionals and accompanied by ethical protestations. But a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment.

2. *Rule of reason instructions*

A famous articulation of the rule of reason appears in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

In *National Society of Professional Engineers v. United States*, 435 U.S. at 691, referring to *Chicago Board of Trade*, the Court stated that for sixty years it had "adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."

Plaintiffs in the present case requested a rule of reason instruction which stated plainly that: the rule focuses directly on the challenged restraint's impact on competition; the question is whether the agreement merely regulates and thereby promotes competition or is such as may injure or suppress or even destroy competition; and a restraint is not illegal if on balance it promotes competition or has no effect upon competition, but is illegal if on balance it suppresses or injures competition. The trial court declined to give this instruction, and it gave the following instructions on the rule of reason as the jury was to apply it in this case:

> One of the factors to be considered in determining whether any agreement in restraint of trade is unreasonable is whether it has or is likely to have unreasonable effects. The law is not concerned with restraints of trade that are not anticompetitive in purpose unless they also have a substantial adverse effect on the marketplace.
>
> One of the factors you should consider in judging reasonableness is the effect of the defendants' practices on competition, if any, that exists between chiropractors generally and medical doctors. You have been instructed as to the definition of the term "competition" in an antitrust case such as this, and you must keep that definition in mind when considering whether there was any effect on competition.
>
> If you find from the evidence that defendants engaged in activities, meaning direct, private activities, as distinguished from governmental activities, which have had a substantial effect in preventing chiropractors from offering services which are reasonably interchangeable by consumers for the same purposes as the services offered by medical doctors, that would be an element weighing on the side of unreasonableness. If, on the other hand you find from the evidence that the defendants' activities did not have any substantial effect in preven-

ting chiropractors from offering such services as licensure permits, that would be an element weighing on the side of the reasonableness of the defendants' activities.

If you find that the conduct complained of on the part of the defendants was not so motivated by economic considerations that it amounted to a per se violation of the antitrust statutes, you then must consider whether the actions of those defendants in agreeing to adopt and enforce certain ethical standards or principles as a means of eliminating or preventing associational activities between chiropractors and medical doctors had the effect of unreasonably restraining the trade of chiropractors.

In this regard, it is a proper function of professional associations to formulate and express principles concerning desirable standards of professional conduct and service. This is so because such principles may benefit the public by raising professional standards generally, and by helping to insure that the profession merits the trust that the public necessarily places in its members. Such principles also assist members of the profession by giving them guidance as to generally accepted standards of conduct in their profession.

In judging whether a particular professional standard in operation produces an unreasonable restraint of trade, it is necessary to consider the genuineness of the justification advanced in support of the standard, the reasonableness of the standard itself, the manner of its enforcement, and the effects of it on the relevant area of trade or commerce.

The fact that an ethical standard which affects the conduct of one profession, such as medical doctors, may also have an indirect effect on the activities of another profession, such as chiropractors, does not alone mean that it amounts to an unreasonable restraint of trade. Rather, the determination to be made is whether, as a consequence of the operation

of that standard, there has been a cognizable adverse effect on the public interest in the sense that the opportunity of chiropractors to provide services they are licensed to provide and the opportunity of the public to receive those services has been unreasonably impaired or obstructed.

[Y]ou are further instructed that chiropractors have been given the right by law to carry on their practice and to engage in the treatment of patients, subject to whatever legal limits are placed on their licenses. The question of whether chiropractic poses an impermissible hazard to the health and welfare of the public is one for the Congress and/or the state legislatures to resolve, not the defendants or other private persons or groups. Because those legislative entities alone have the authority to determine whether chiropractors should be permitted to offer their services to the general public, the law will not allow their decision to be overturned.

It is a different question, however, whether members of the medical profession may limit their own relationships with chiropractors for the purpose of practicing their own profession according to standards they consider necessary or desirable for the proper practice of medicine. As I have already instructed you, reasonable ethical principles having that objective and not aimed at barring the practice of chiropractic within the limits allowed by state licenses may be lawful if they do not, in operation, also have a significant and unnecessarily adverse effect on the chiropractors' ability to carry on their trade. You may, therefore, consider as bearing on the reasonableness of the defendants' purposes what the evidence shows to be the depth and sincerity of their beliefs that the sharing of responsibility by doctors with chiropractors poses substantial hazards to the welfare of patients and the public welfare.

Plainly the instructions as given failed to convey that the single standard is whether the challenged agreement

is one that promotes competition or one that suppresses competition.

It is true, as defendants argue on appeal, that the instructions as given include the following points:

> "One of the factors to be considered in determining whether any agreement in restraint of trade is unreasonable is whether it has or is likely to have unreasonable effects . . . . One of the factors you should consider in judging reasonableness is the effect of the defendants' practices on competition, if any, that exists between chiropractors generally and medical doctors." If the jury were to find that defendants' activities had had a substantial effect on the chiropractors' ability to compete, "that would be an element weighing on the side of unreasonableness." The determination to be made is whether "there has been a cognizable adverse effect on the public interest in the sense that the opportunity of chiropractors to provide services they are licensed to provide and the opportunity of the public to receive those services has been unreasonably impaired or obstructed." It is for legislative bodies alone to decide whether chiropractic should be permitted; they have decided that it should; "the law will not allow their decision to be overturned." Even ethical principles limiting the relationships of medical doctors with chiropractors for the purpose of protecting the medical doctors' own profession, and not aimed at barring the practice of chiropractic within the limits licensed by the state, are unlawful if, in operation, they "have a significant and unnecessarily adverse effect on the chiropractors' ability to carry on their trade."

The passages just summarized include every portion of the instructions which might be thought to approximate an instruction that the single standard is whether the challenged agreement merely regulates and perhaps thereby promotes competition or is such as may suppress or even destroy competition. In a case in which a "public interest motive" has not been made the centerpiece of the

defense, an indulgent appellate court might conceivably decide that this portion of the instructions sufficiently approximated the single standard. But surely in the context of the present case, this is not possible. To instruct that "the effect of the defendants' practices on competition" is "one" of the factors in judging reasonableness and that "a substantial effect in preventing chiropractors from offering services" in competition with medical doctors is "an" element weighing on the side of unreasonableness is unmistakably to suggest that the jury was free, even obliged, to weigh factors unrelated to impact on competition. The expression "unnecessarily adverse" can mean only that an adverse effect on competition may be "reasonable," within the meaning of the rule of reason, if there is a necessity for it arising from some value unrelated to free competition.

Any possibility that the instructions as given sufficiently approximated the single standard of promoting or suppressing competition is dispelled by other portions of the instructions on the rule of reason. After being told of the importance of ethical canons in raising professional standards generally and in insuring that public trust in the members of the profession is merited, the jury was instructed that in judging whether a particular professional standard, in operation, produces an unreasonable restraint of trade, it was "necessary to consider the justification advanced in support of the standard, the reasonableness of the standard itself, the manner of its enforcement," as well as "the effects of it on the relevant area of trade or commerce." Again, the implication is unmistakable: the "reasonableness" of the standard, in terms of values unrelated to free competition (in this case, generally raising the standards of the medical profession and insuring that the public trust in that profession is merited), is a factor which it is "necessary" for the jury to consider in addition to its consideration of the standard's effects on competition.

We appreciate that in the classic exposition in *Chicago Board of Trade*, it was said that facts relevant to the test of promotion or suppression of competition include: "[t]he

history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained . . . ." 246 U.S. at 238. But the Court followed this observation immediately with the statement that "[t]his is not because a good intention will save an otherwise objectionable regulation, . . . but because knowledge of intent may help the court to interpret facts and to predict consequences." *Id.* We understand this to mean that it is effect or consequence which controls, not intent or motive. In ascertaining effect or consequence, it is useful to determine the setting in which the restraint was adopted and the effect or consequence which its instigators anticipated. An anticipated effect on competition may be somewhat more likely to have emerged as the true effect than an unanticipated effect. But in a claim for damages (as contrasted with injunctive relief), the true effect, as it has emerged, is the critical and sole factor.

On this appeal, defendants stoutly insist that the references in the instructions to the "genuineness" of the justification advanced in support of the standard, the "reasonableness" of the standard itself, and the "depth and sincerity" of defendants' beliefs about chiropractic, were all clearly subordinated to the inquiry blessed in *Chicago Board of Trade*. That is, as we understand the contention, defendants refrain, on this appeal, from disputing that the effect on competition is the single test. They contend that in determining that effect, it is useful to inquire into what the instigators anticipated the effect on competition would be; inquiry into that anticipation includes inquiry into the instigators' "reason for adopting the particular remedy" and the "purpose or end sought to be attained" by them; inquiry into what their true (as contrasted with pretextual) "reason," "purpose" or "end" may have been, in turn, may be affected by ascertaining their "genuineness," the "depth and sincerity" of their beliefs, and the "reasonableness" of the means they chose.

Conceivably, an instruction which explained this tortuous sequence might pass muster, but the instructions as

given fail utterly to explain in understandable language the severely limited function of the inquiry, sanctioned by *Chicago Board of Trade*, into the reason for adopting the ethical canon and the purpose or end sought to be attained by it.[9]

In short, the instructions given cannot be defended successfully as an adequate approximation of a rule of reason test geared simply, clearly, and exclusively to the question whether the challenged conduct promoted or suppressed competition between medical doctors and chiropractors. We cannot escape the conclusion that in the district court, defendants flatly resisted the test geared exclusively to effect on competition and sought a modification which affords recognition to values other than those associated with unrestrained competition. The district court acceded to these urgings. From the jury's viewpoint, the result was ambiguity, an uncertain trumpet.

The judgment must be reversed unless: (1) the district court and we are free to modify the rule of reason test in this case involving Principle 3 of the AMA Principles of Medical Ethics; and (2) despite their ambiguity, the instructions adequately expressed the permissible

[9] Defendants explain that the phrases "genuineness of the defendants' justification" and "reasonableness of the standards themselves" were drawn from *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979). An abortion clinic claimed, among other things, that the defendant medical doctors had conspired to boycott it, and the district court granted defendants' motion for summary judgment. In reversing in part, the court of appeals commented that even if defendants' efforts to enforce professional standards were to be tested by the rule of reason, rather than the *per se* rule, factual issues remained "as to the genuineness of the defendants' justification, the reasonableness of the standards themselves, and the manner of their enforcement." *Id.* at 547. The Fifth Circuit's choice of words in its cryptic dealing with this summary judgment question cannot fairly be accorded the immense significance attributed to it by defendants in the context of the case before us.

modification, without prejudice to the plaintiffs' proper interests. We hold that the district court and we are free to modify the rule of reason test in a case involving a certain kind of question of ethics for the medical profession, but that the instructions as given failed to express a permissible modification and that prejudice to the plaintiffs resulted.

As we have noted, in the course of its relatively recent application of the Sherman Act to the professions, including the medical profession, the Supreme Court has been markedly careful to preserve the courts' freedom to discriminate between nonprofessional and professional activities, in construing and applying the Act. "The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently . . . ." *Goldfarb v. Virginia State Bar*, 421 U.S. at 787, n. 17. "[B]y their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary." *National Society of Professional Engineers v. United States*, 435 U.S. at 696. It is true that in *National Society of Professional Engineers*, the theme from *Goldfarb* was echoed in a context in which the Court was emphasizing the narrow limits of the theme and was making clear that even in the setting of the profession of engineering, even in the face of a possibly accurate contention that the consequence of competitive bidding would be corner-cutting dangerous to the users and consumers of products, "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* Moreover, in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court held it not only a violation of the rule of reason, but a *per se* violation, for medical doctors to agree upon maximum fees that they might claim in full payment for health services provided to policyholders of specified insurance plans, despite the doctors' contention that the agreement facilitated the successful marketing of an insurance plan

in which the participating medical doctors had no financial interest and which apparently was beneficial to consumers.

Conscious of the narrowness of the range of the preserved opportunity for differential treatment of professions and nonprofessions under the Sherman Act, we believe that the considerations reflected in the AMA's Principle 3 fall within that range. In his concurrence in *National Society of Professional Engineers v. United States*, Justice Blackmun regretted the intimations he found in the Court's opinion that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden by the Act. He expressed the view that flexibility should remain, in the professional context, to "take account of benefits other than increased competition" and to recognize "that there may be ethical rules which have a more than de minimis anticompetitive effect and yet are important in a profession's proper ordering." 435 U.S. at 699-700.

In the case at hand, evidence of what we have referred to as the "patient care motive" was that when they enter into a doctor-patient relationship with specific persons, medical doctors believe it is essential to bring scientific method to bear upon diagnosis and treatment. There was evidence of their belief that to collaborate with chiropractors in the care of persons who are patients of the medical doctors is to compromise the application of scientific principles, to violate the oaths taken by the medical doctors, and to introduce risk to the health and lives of the patients for whom the medical doctors have accepted responsibility. Clearly, an individual medical doctor is free to act on this belief by declining to associate with a particular chiropractor in the care of a particular patient. It seems reasonable that two or three medical doctors, sharing this view and working as a team in the care of a particular patient, would be free to agree, and to act on the agreement, to decline to associate with a particular chiropractor in the care of that patient. The Sherman Act problem in the present case arises from the express embodiment of this viewpoint in a formal set of

ethical principles promulgated by a large association of medical doctors, and by the alleged efforts of that association and kindred associations to give effect to the exclusionary attitude in the setting of hospitals staffed by medical doctors.

If it should be determined eventually in this case that the Sherman Act was violated, that determination should not rest on insistence that the Act is indifferent to, or even hostile to, the value of permitting medical doctors to honor in their practice what they perceive to be scientific method, or indifferent to or hostile to the value of encouragement, from within the profession, to its members to honor scientific method by declining to associate with those thought to dishonor it. A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds. Because Congress has for so long assigned such pronounced value to freedom of competition and the Supreme Court has for so long applied the rule of reason so as virtually to exclude other values (except, for example, the value of activity protected by the first amendment), the adaptation of the rule of reason in the Principle 3 setting should impose a heavy burden on those who would justify conduct having significant anticompetitive effect.

The jury should be instructed in appropriate language to the following effect: The burden of persuasion is on the plaintiffs to show that the effect of Principle 3 and the implementing conduct has been to restrict competition rather than to promote it. If the plaintiffs have met this burden, the burden of persuasion is on the defendants to show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care

could not have been adequately satisfied in a manner less restrictive of competition.

We hold that this requirement does not constitute an affirmative defense which must be pleaded. Fed. R. Civ. P. 8(c). We hold, however, that if plaintiffs meet their burden to show that the effect has been to restrict competition, they make a prima facie showing that the restraint has been unreasonable, within the meaning of Section 1 of the Sherman Act. Only if the defendants then meet their burden, as described, does their conduct escape condemnation as unreasonable. We commend the use of a special verdict to permit the jury to understand clearly the nature and sequence of the questions it must answer, and where the burden of persuasion lies with respect to each question.

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Court recognized a value in the absence of the use of fraudulent techniques within the New York Stock Exchange and recognized that vindication of this value was the dominant goal of the Exchange. Nevertheless, it found that the means chosen to vindicate the value was not the least restrictive available to achieve substantial vindication. Similarly, in *National Society of Professional Engineers v. United States*, the challenged rule of the Society was "grossly overbroad." 435 U.S. at 699-700 (Blackmun, J., concurring).

We appreciate that the last paragraph of that segment of the rule of reason instructions we have quoted above bears resemblance to the adaptation of the rule we have discussed. It refers to limitation of relationships with chiropractors for the purpose of practicing medicine according to standards deemed necessary or desirable; to principles having that objective and not the objective of barring chiropractic within its licensed limits; and to the absence of "a significant and unnecessarily adverse effect on the chiroprators' ability to carry on their trade." However, if any modification of the single-test rule of reason (promotion versus suppression of competition) is permissible, the modification must be explained to the

jury forthrightly and precisely, and in particular the least restrictive means requirement must be set forth more understandably than by the use of the single word "unnecessarily" in the phrase "significant and unnecessarily adverse effect on the chiropractors' ability to carry on their trade."

There is another important respect in which the instructions were inadequate and prejudicial to plaintiffs: they failed to distinguish sharply enough between the "public interest motive" and the "patient care motive."

The patient care motive could explain nothing more than the refusal by the medical doctors, and the hospitals staffed by medical doctors, to associate with chiropractors in the treatment of patients. It could not explain, for example, defendants' efforts to persuade Congress, state legislatures, and federal and state agencies to enact laws and to promulgate rulings to contain or to eliminate chiropractic. The motive for this "political" activity, the jury must have found, was either the money motive or the generalized public interest motive, or a combination of the two. We will assume, for the moment, that the jury found the political activity to be entirely protected by the first amendment (see III A3, *infra*). A critical question for the jury was whether defendants conspired to contain and to eliminate chiropractic generally, not only by waging constitutionally protected political warfare, but by waging economic warfare; that is, by engaging in aspects of the alleged boycott not limited to a refusal to associate in the care of specific patients. If the jury found that defendants had indeed engaged in economic warfare against chiropractic generally, beyond a refusal to associate in the care of specific patients, it was important that the jury understand that a generalized public interest motive affords no legal excuse for such economic warfare.

Since at least as early as 1941 when *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, was decided, it has been clear that private persons and entities may not presume to function as "an extra-

governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Id.* at 465. It is true that medical doctors are better qualified than most members of the public to form an opinion whether chiropractic poses a threat to public health, safety and welfare. They are free to attempt to persuade legislatures and administrative agencies. But a generalized concern for the health, safety and welfare of members of the public as to whom a medical doctor has assumed no specific professional responsibility, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with some medical doctors by chiropractors.

The jury was instructed that chiropractic was lawful within the limits imposed by Congress and state legislatures; that whether chiropractic poses an impermissible hazard to the health and welfare of the public is for Congress and state legislatures to resolve; and not for the defendants; and that the law will not allow the legislative decision to be overturned. The jury was then told that it is a different question whether medical doctors may limit their own relationships with chiropractors.

Had the jury been instructed that the sole test under the rule of reason was the effect of defendants' conduct on competition and that the jury must disregard evidence both of defendants' public interest motive and of their patient care motive, plaintiffs would have suffered no prejudice, of course. But when the district court ventured to instruct that defendants' concerns with the perceived threat of chiropractic were relevant to the jury's task, it was essential that a line be drawn sharply and unmistakably between evidence of the public interest motive and evidence of the patient care motive. We conclude that such a line was not drawn with sufficient emphasis and clarity.

We conclude that the instructions to the jury were prejudicially erroneous in two respects. The overriding ques-

tion in the case was whether, in applying the rule of reason, the jury was to be allowed to consider any factor whatever beyond the effect of defendants' conduct on competition. The district court elected to permit the jury to go beyond that single test and to consider the defendants' motives. But it failed to confine that consideration sharply to defendants' patient care motive, as contrasted with their generalized public interest motive. And, with respect to the patient care motive, the court failed to convey clearly and understandably the manner in which the jury was to weigh it, particularly as to the least restrictive means requirement.

The verdict and the judgment cannot stand.

3. *First amendment*

There was evidence of considerable activity on the part of one or more of the defendants directed to winning or defeating bills in Congress and in state legislatures, and other activity directed to federal and state agencies responsible for administering laws in the health care field.

Plaintiffs assert that two instructions on freedom of speech and association labelled all speech and writing as protected by the Constitution, thus suggesting that defendant AMA's ethical canons could not be a basis for finding a Section 1 violation unless the canons were coercively enforced. The instructions at issue were general descriptions of first amendment rights, merely a part of the court's statements on the relationship between the first amendment and the Sherman Act. Subsequent instructions limited the general instructions on first amendment rights.

The *Noerr-Pennington* doctrine extends protection to businesses and other associations when they join together to petition legislative bodies, administrative agencies, or courts for action that may have anticompetitive effects. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents*

Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). In *California Transport*, the Court created the "sham" exception to the doctrine:

> "[A] pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."

404 U.S. at 513. *See also Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (antitrust liability attaches when repetitive lawsuits raising unsubstantial claims evidence goal of suppressing competition). The sham exception exposes fraudulent and illegitimate petitioning activities to Sherman Act prohibitions.

Plaintiffs complain that the court's explanation substantially distorted the *Noerr-Pennington* doctrine and the sham exception by instructing the jury that defendants' advocacy activity directed to legislative and administrative agencies or bodies was protected if "the defendants undertook such efforts to influence governmental bodies with a sincere purpose to obtain the governmental actions that they sought."

Plaintiffs' contention is without merit. In *Noerr*, the defendants had conducted a publicity campaign which the plaintiffs claimed was distorted and directed to harming the plaintiffs' public image more than to obtaining legislative action. The Court agreed that the publicity campaign fell "far short of the ethical standards generally approved of in this country." 365 U.S. at 140. But as long as the defendants "were making a genuine effort to influence legislation," their actions did not violate the Sherman Act. *Id.* at 144. Thus, the trial court's statement

in this case properly explained an important aspect of the *Noerr-Pennington* doctrine. *See Federal Prescription Service v. American Pharmaceutical Association*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

4. *Coercive enforcement*

Plaintiffs contend the trial court incorrectly instructed the jury that it could not find the requisite agreement unless the ethical canons at issue were coercively enforced.

It is not essential to a conspiracy under the Sherman Act that the conspirators possess or demonstrate their power to carry out their anticompetitive plan. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940). In *National Society of Professional Engineers v. United States*, a provision of the society's code of ethics prohibited members from providing price information to potential clients which would permit the latter to make price comparisons among those performing engineering services. The district court found the society had "actively pursue[d] a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients," and had "engaged in educational campaigns and personal admonitions to members and clients who were suspected of engaging in competitive bidding practices." 389 F. Supp. 1193, 1200 (D.D.C. 1974). In Supreme Court argument, the society claimed it had never enforced the ban on competitive bidding. The Court deemed the lower court's finding sufficient to fulfill the §1 agreement criterion. 435 U.S. at 684, n. 5. In *Goldfarb v. Virginia State Bar*, the Court noted the power the state bar association's ethical opinions on minimum-fee schedules exerted over its members:

> [The] opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to

> comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths.

421 U.S. at 791, n. 21. Thus, even without coercive enforcement, a court may find that members of an association promulgating guidelines sanctioning conduct in violation of §1 participated in an agreement to engage in an illegal refusal to deal.

Plaintiffs' complaint is specifically addressed to two instructions as given. One stated in pertinent part:

> In considering the first element [of a group boycott]—that is, whether there was an agreement to engage in, or to coerce others to engage in, a concerted refusal to deal with chiropractors—you should consider what the evidence shows to be the manner and extent of enforcement of the ethical standards involved in the case.
>
> The effect of an ethical principle in restraining trade, if there is any such effect, depends upon the extent to which it actually operates to limit the freedom of persons to whom it is addressed. An ethical standard may serve as a guideline, advice or recommendation to medical doctors, leaving them free to evaluate the principle and to make their own decisions as to what constitutes sound ethical practice. On the other hand, such a rule may be regarded by doctors as a binding rule which they are required in all circumstances to follow. You must determine, therefore, whether the ethical standards in this case operated only as guidelines or whether they were employed to, and/or had the effect of, controlling the actions of members of the medical profession.

Another instruction given concerned the liability of defendant AHA, and said: "You may not find the AHA liable for any action taken against the plaintiffs by individual hospitals in this case unless plaintiffs have proven that those hospitals are members of the AHA and that AHA intentionally coerced or induced that action."

The district court refused to instruct the jury that proof of coercive enforcement was not required, as requested by plaintiffs:

> There need be no assurances among the conspirators, either oral or in writing, to the effect that they would adhere to the plan. Nor is it necessary that there exist a coercive mechanism by which the conspiracy may be enforced. It is enough that a mutual understanding was reached, and that the defendants in fact conformed to the arrangement.

The instructions as given were unfortunately ambiguous, but they did not state that coercive enforcement was required. One mentioned enforcement, but did not imply that coercive enforcement action was necessary. Another mentioned coercive enforcement only in the disjunctive: "coerced or induced." Although plaintiffs' proposed instruction correctly states the law, the court did instruct the jury that:

> What the preponderance of the evidence in the case must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

Sufficiently to avoid the necessity of reversal on this ground, this instruction described the nature of the agreement plaintiffs had to prove.[10]

[10] Plaintiffs contend, also, that the court failed to instruct on one of their conspiracy theories: namely, that the individual members of each defendant organization conspired among themselves. Although not explicit on the point, the instructions as given (e.g., "plaintiffs . . . have alleged that . . . the defendants and their members have agreed . . . .") were sufficient to reveal to the jury that this was one of plaintiffs' theories.

5. *Apparent authority*

Significant evidence bearing on the conspiratorial conduct of JCAH, AHA, and ISMS related to certain employee conduct, which witnesses testified was unauthorized by those organizations. The district court denied plaintiffs' request for a jury instruction to the effect that an association may be liable for the conduct of employees who have acted with apparent, but not actual, authority. The instruction given stated only that an association is responsible for acts done within the scope of an employee's authority, explaining that the existence of authority may be shown by circumstantial evidence. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), decided subsequently to the trial in the case before us, holds flatly that apparent authority is sufficient to support civil antitrust liability on the part of a standard-setting organization. The evidence was sufficient to permit the jury to find that JCAH and AHA—and ISMS in association with JCAH and AHA—were standard-setting organizations. The factual record requires us to hold that with respect to defendants JCAH, AHA and ISMS, plaintiffs were prejudiced by the district court's erroneous refusal to instruct the jury on the significance of apparent authority of employees.

B. *Admission of evidence*

Even if reversal were not required by reason of error in the jury instructions, we would be obliged to reverse by reason of the ruling receiving in evidence the volume of evidence about the Parker School of Chiropractic and about the plaintiff Bryden's one-time arrangement with a furniture store on the sale of mattresses to Bryden's patients. We would do so with great reluctance, recognizing keenly the difficulties encountered by a trial judge in a trial of this length and complexity. The evidence was relevant to the genuineness of the defendants' belief that chiropractic is quackery. That is, evidence tending to show that chiropractic is in fact quackery is probative

that defendants genuinely entertained the belief that it is quackery. But the genuineness of defendants' beliefs on that subject, whatever its proper legal significance in the trial, is a subject that could have been addressed with a less extravagant volume of evidence, and with far less emphasis upon alleged financial greed. The items we have specified created such a danger of unfair prejudice and confusion of issues that it was an abuse of discretion not to exclude it under Fed. R. Evid. 403.

C. *Unclean hands*

Before trial, the district court correctly granted plaintiffs' motion to strike the affirmative defense of unclean hands, thus barring evidence that plaintiffs had themselves violated the antitrust laws. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968), and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951). As the cross-examination of plaintiff Bryden was about to commence, plaintiffs counsel moved for an order barring defendants from inquiring of him about an arrangement Bryden had had with a furniture store for a payment to Bryden when, upon his recommendation, a patient purchased a certain type of mattress. The district court denied the motion on the ground that such testimony would be relevant to the genuineness of defendants' belief that chiropractic is quackery.

On cross-examination, Bryden acknowledged that, without the knowledge of his patients, he had had such an arrangement with the store. Asked by defendants' counsel whether he considered it ethical, Bryden responded: "It is probably as ethical as MDs owning pharmacies . . . ." Apparently to lessen the effect of Bryden's remark, examining defense counsel immediately referred, ambiguously, to a version of AMA's Principles of Ethics, already in evidence, and he suggested that it is unethical for medical doctors to own drug stores. From discussion out of the jury's hearing, it developed that such ownership is not unethical, if patients are not exploited.

Controversy developed with respect both to the mattresses and to the physician-owned drug stores, and eventually the court permitted the testimony about the mattresses to stand, instructed the jury to disregard defense counsel's attempt to describe what the AMA Principles say about physician-owned drug stores, and denied plaintiff's motion for a mistrial. In closing argument, defendants referred to Bryden's involvement in the arrangement "whereby in exchange for their endorsement and promotion of the firm's mattresses, the chiropractors would get a rake-off on each one sold." The trial court refused to give plaintiff's proposed instruction that unclean hands was not a defense in this case.

For reasons set forth in III B, above, we have concluded that plaintiffs were prejudiced by the volume and nature of the evidence which defendants were permitted to present, impugning the validity of chiropractic and the integrity of chiropractors. We believe that this prejudice could not have been overcome by an instruction to the effect that the clean hands defense was unavailable, and so we refrain from comment whether the failure to give such an instruction was error. Viewed in isolation, however, the episode concerning the mattresses and physician-owned drug stores did not require the district court to grant a mistrial.

D. *Reopening of Discovery*

Plaintiffs sought to reopen discovery to investigate whether some defendants had attempted to prevent unilateral settlements in this case, contending that such attempts could constitute an independent violation of the Sherman Act. Defendants were granted a protective order barring the discovery. The trial court did not abuse its discretion, especially when discovery had continued for nearly four years and trial was imminent.

E. *Involvement of JCAH, AHA, ACP, ACS and ISMS*

The evidence summarized under "Facts" in part II, above, clearly supports findings that there was con-

siderable communication on the subject of chiropractic between the AMA, on the one hand, and, on the other, each of the five organizations which moved for a directed verdict; that this communication revealed acquiescence by all five organizations in the AMA view that chiropractic is quackery and cultism; that JCAH and AHA cooperated to give practical effect to this view by discouraging hospitals from permitting use of their facilities by chiropractors; that by their direct, formal and significant organizational participation in JCAH and by their own activities, ACP and ACS endeavored both to discourage hospitals from permitting use of their facilities by chiropractors and to discourage medical doctors from professional association with chiropractors; and that by adopting the AMA Principles of Medical Ethics and by embodying the Principles in its own policy manual, ISMS endeavored to discourage medical doctors from professional association with chiropractors. Had a reasonable jury made these findings, as it would have been free to do, the findings were sufficient to permit, although not to require, a finding that JCAH, AHA, ACP, ACS and ISMS each knew that concerted action in a scheme was contemplated and invited and that each acquiesced and participated in that scheme. Such a finding would have provided sufficient footing for liability in this civil antitrust action. *See Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-227 (1939). The district court did not err in denying the motions for directed verdicts in favor of these five defendants.

F. *The Section 2 Claim*

The plaintiffs' asserted cause of action based on Section 2 of the Sherman Act was somewhat muted at trial and was virtually ignored on this appeal. Because of the rulings we have made on the Section 1 claim, relating to the admission of prejudicial evidence and to the legal significance of apparent authority, we reverse the judg-

ment as to the Section 2 claim. We refrain from expressing an opinion with respect to any other matters as they bear on the Section 2 claim.

IV. *ORDER*

The judgment appealed from is reversed and the case is remanded for a new trial.[11]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] The motion by the Health Care Equalization Committee of the Iowa Chiropractic Society, pursuant to Federal Rules of Appellate Procedure 27, for the limited purpose of obtaining access to discovery, is denied.

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Opinion by Judge Doyle

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 19, 1983.

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge*

Hon. JAMES E. DOYLE, Senior District Judge**

DR. CHESTER A. WILKE, D.C., et al.,
Plaintiff-Appellants,

No. 81-1331 *vs.*

AMERICAN MEDICAL ASSOCIATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-3777
Judge Nicholas J. Bua

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

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* Judge Sprecher heard oral argument and participated in the conference which followed. He died May 15, 1982, and did not participate in the presentation or approval of this opinion.

** James E. Doyle, a Senior United States District Judge for the Western District of Wisconsin, is sitting by designation.

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued January 20, 1982

October 25, 1983

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge*
Hon. JAMES E. DOYLE, Senior District Judge**

No. 81-1331

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA A. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C; and MICHAEL D. PEDIGO, D.C.,

Plaintiffs-Appellants,

v.

AMERICAN MEDICAL ASSOCIATION; AMERICAN HOSPITAL ASSOCIATION; AMERICAN COLLEGE OF SURGEONS; AMERICAN COLLEGE OF PHYSICIANS; JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY; AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS; ILLINOIS STATE MEDICAL SOCIETY; H. DOYL TAYLOR; JOSEPH A. SABATIER, M.D.; H. THOMAS BALLANTINE, M.D.; JAMES H. SAMMONS, M.D.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 76 C 3777

NICHOLAS J. BUA, Judge

* Judge Sprecher heard oral argument and participated in the conference which followed. He died May 15, 1982, and did not participate in the preparation or approval of this order.

** James E. Doyle, Senior United States District Judge for the Western District of Wisconsin, is sitting by designation.

ORDER

In an opinion entered September 19, 1983, we addressed the contention made by each of five organization defendants (the Joint Commission on Accreditation of Hospitals (JCAH), The American Hospital Association (AHA), the American College of Physicians (ACP), the American College of Surgeons (ACS), and the Illinois State Medical Society (ISMS): that its motion for a directed verdict had been erroneously denied by the district court; that the evidence was insufficient to support a jury finding that the particular defendant organization was a member of a conspiracy; and that the judgment of dismissal as to it should be affirmed even if the judgment in favor of other defendants were to be reversed on one ground or another. We now address a similar contention which was advanced by defendant-appellee, the American Academy of Orthopoedic Surgeons (AAOS).

At the close of the plaintiffs' evidence and again at the close of all the evidence, AAOS moved for a directed verdict in its favor. Rulings were reserved. Following the return of the verdict in favor of all defendants, the district court denied the motions, without comment. An indication of the district court's view appears in an evidentiary ruling made on the third day of trial. Based on the pleadings, on all the motions which had previously been filed (including motions for summary judgment), and on "everything that the court has considered in this case," the district court determined that there was evidence that there had been "a conspiracy among all of the defendants," and that this evidence was sufficient to permit use against all the defendants of statements made by any of them in furtherance of the conspiracy.

Viewing the evidence concerning AAOS' participation most favorably to the plaintiffs, it was sufficient to permit a reasonable jury to find as fact those matters set forth below under the heading "FACTS."

FACTS

In the early 1960's, David Stevens, an orthopaedic surgeon practicing in Kentucky, became particularly interested in what he perceived as problems relating to chiropractors. In 1966 or 1967, he drafted a resolution for presentation to the Kentucky Medical Association, condemning chiropractic. Before presenting the proposed resolution, he submitted it to the AMA legal staff for its suggestions. A Robert Youngerman, an AMA lawyer, suggested striking a reference to furthering the elimination of chiropractic. Youngerman commented that such language might bear monopolistic overtones and that it could be omitted without changing the intent. Stevens accepted the suggestion. The result was a proposed resolution affirming the position adopted by the AMA House of Delegates in 1966 that chiropractic is an unscientific cult. Such a resolution bore considerable significance when related to AMA's Principle 3, which condemned professional association with anyone who violates the principle that a method of healing should be founded on a scientific basis. The effect of the resolution was expressly to identify chiropractors as persons with whom medical doctors should refrain from associating. The Kentucky group approved the resolution. Then, in January 1967, Stevens, a member of AAOS, attended a meeting of the AAOS membership in San Francisco. Youngerman also attended. The Kentucky resolution was presented to the AAOS membership by Stevens and was approved. In 1968 Stevens became a member of the AMA Committee on Quackery and remained a member until 1974.

As of 1967 and continuing until 1980, AAOS members were required to abide by the AMA's principles of ethics.

AAOS coordinated its activities on the subject of chiropractic with AMA's Committee on Quackery and with ACS.

The present lawsuit was commenced in 1976. In 1978 AAOS expressed the view that Principle 3 forbids a medical

doctor from accepting referral of a patient by a chiropractor and reporting back to the chiropractor.

CONCLUSIONS OF LAW

In our September 19, 1983 opinion we set forth the evidence from which a reasonable jury could have found the existence of a conspiracy. AAOS contends that the activities allegedly establishing its participation in the conspiracy were protected by the first amendment, and that the remainder consisted simply of adopting an ethical principle (AMA Principle 3). AAOS contends that in any event the evidence of its membership in the conspiracy was too thin.

As we have determined in our September 19, 1983 opinion, the jury was properly instructed on the first amendment issues. It could properly have found that certain conduct by various defendants, including AAOS, was constitutionally protected. However, the evidence permitted the jury to find: that there was communication between the AMA and AAOS on the subject of chiropractic; that this communication revealed acquiescence by AAOS in the AMA view that chiropractic is unscientific cultism; and that by adopting the essence of the 1966 AMA policy statement, in combination with AMA's Principle 3, AAOS endeavored to discourage medical doctors from professional association with chiropractors. Had a reasonable jury made these findings, the findings were sufficient to permit, although not to require, a finding that AAOS knew that concerted action in a scheme was contemplated and invited and that AAOS acquiesced and participated in that scheme. Such a finding would have provided sufficient footing for liability in this civil antitrust action. *See Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-227 (1939). Even in a criminal case, "[o]nce the conspiracy has been established, slight evidence is needed to connect a particu-

lar participant." *United States v. Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978). It is not necessary that the particular acts of a member be wrongful, absent a conspiracy, but only that they reveal the intent to participate in an unlawful enterprise.

AAOS points to evidence that one of its members had had professional relations with chiropractors in treating sports injuries, and to a stipulation in evidence that AAOS had never conducted even an investigation of any member for infraction of any ethical principle and thus, of course, had never visited any sanction upon a member for such an infraction. However, as stated in our September 19, 1983 opinion, the jury was free to consider the power which a professional association's ethical strictures exert on its members, even in the absence of coercive enforcement.

The district court did not err in denying AAOS' motions for a directed verdict in its favor.

ORDER

We reaffirm, as to defendant-appellee American Academy of Orthopaedic Surgeons, our order of September 19, 1983 reversing the judgment appealed from and remanding for a new trial.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 1, 1983

Before

Hon LUTHER M. SWYGERT, Senior Circuit Judge

Hon. JAMES E. DOYLE, Senior District Judge*

Hon. _____

DR. CHESTER A. WILK, D.C., et al.,
Plaintiffs-Appellants,

No. 81-1331 *vs.*

AMERICAN MEDICAL ASSOCIATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 3777
Nicholas J. Bua, Judge.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing en banc filed in the above matter, no active member of the court** having requested a vote on the suggestions for an en banc rehearing, and the members of the panel having voted to deny said petition for rehearing,

IT IS ORDERED that said petition for rehearing be, and the same is hereby DENIED.

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* The Honorable James E. Doyle, United States Senior District Judge for the Western District of Wisconsin, sitting by designation.

** The Honorable Richard A. Posner, Circuit Judge, has not participated in the consideration or decision of the petitions for rehearing.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable BUA

Date January 30, 1981

CHESTER A. WILK

v.

AMERICAN MEDICAL ASSOCIATION

No. 76 C 3777

Trial held—Jury. Jury returns verdict in favor of all defendants. Court enters judgment in favor of all defendants. Trial ends. Motions of defendants for directed verdict made at close of plaintiffs' case and at close of all evidence, previously taken under advisement, are all denied.

Dated at Chicago, Illinois, this 30th day of January 1981.

UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

Civil Action File No. 76 C 3777

A. WILK, et al

vs.

AMERICAN MEDICAL ASSOCIATION, et al

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Nicholas J. Bua, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiffs take nothing and action is dismissed on the merits.

Dated at Chicago, Illinois, this 30th day of January, 1981.

H. STUART CUNNINGHAM
Clerk of Court

[6981] IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

CHESTER A. WILK, D.C., et al.,
Plaintiffs,

v.

AMERICAN MEDICAL ASSOCIATION, et al,
Defendants.

No. 76 C 3777

Before
The Honorable NICHOLAS J. BUA
and a Jury

Thursday, January 29, 1981 9:00 a.m.

TRIAL RESUMED PURSUANT TO ADJOURNMENT.

PRESENT:

GEORGE P. MCANDREWS
ROBERT C. RYAN
PAUL E. SLATER

on behalf of the plaintiffs;

MAX E. WILDMAN
DOUGLAS R. CARLSON
MICHAEL L. MCCLUGGAGE

on behalf of the defendant, American Medical Association, and individual defendants;

DENNIS C. WALDON

on behalf of the defendant, American Hospital Association;

VOLUME THIRTY-SIX

[7124] beliefs and ideas is an inseparable aspect of freedom of speech. The freedom to associate is a basic Constitutional freedom.

The activities of defendants of which plaintiffs have complained in this case include actions directed to obtaining legislation by Congress or by the states that is unfavorable to chiropractors, or to defeating legislation that is or would be beneficial to chiropractors, such as including chiropractors under Medicare and Medicaid.

In addition to such legislative actions or efforts, the defendants' activities have included actions directed to other governmental agencies or bodies, such as officials of the Department of HEW, or State administrative bodies, and officers responsible for administering laws in the health care field.

The Court charges you that none of these activities directed toward influencing legislatures or other public officials may be considered by you as a violation of the antitrust laws provided you believe the defendants undertook such efforts to influence governmental bodies with a sincere purpose to obtain the governmental actions that they sought. Activities sincerely undertaken for the purpose of influencing legislatures or other public officials do not violate the antitrust laws whether such [7125] activities stand alone or are a part of other activities which might be violations. These activities are protected as free speech under the First Amendment of the United States Constitution.

The law protects joint efforts to influence public officials as fully as it does individual efforts and such joint action cannot be considered to be an unlawful conspiracy. Thus, even if the defendants undertook such activities pursuant to an agreement to cooperate in influencing legislatures or public officials, and even if they sought to induce other organizations to take positions critical of chiropractic in connection with these efforts, their activities are protected.

However, in deciding whether any defendant in this case has conspired in violation of the Sherman Act, you may consider, to a limited extent, the governmental and related activity engaged in by that defendant in order to determine whether the defendant, in engaging in private activity which was not direct petitioning of any governmental body, possessed exclusionary or anti-competitive intent which is an element of a violation of either Section 1 or Section 2 of the Sherman Act.

Regardless of the means which may have been employed by any of these defendants to influence state or federal legislation, or to advocate their positions to [7126] government agencies or officials, it is not a violation of the antitrust laws if the defendants employing these means actually wanted the government agency or officials to take action which might adversely affect or injure chiropractors.

As I have already instructed you, any activities by the defendants that were directed toward influencing legislative, executive or other governmental action cannot be considered as part of any violation of the antitrust laws. Consequently, in considering the question of injury, you may not consider any injury that you find the plaintiffs may have suffered as a result of such activities or of any government action that may have been brought about by such activity.

Sham Governmental Activity

During the course of the trial you have heard evidence concerning the study conducted by the United States Department of Health, Education and Welfare in 1968 and the expert review panel which was selected to make that study and report back to Secretary Cohen.

Plaintiffs in this case claim that the defendant American Medical Association conspired with certain members of that review panel to unfairly bias and distort the report. Plaintiffs claim that prior to the time that the study was even commenced, that agents and employees of the AMA agreed with members of the expert review panel that their findings would be unfavorable to chiropractic and that they would conclude that chiropractic lacked scientific merit. Plaintiffs claim that the purpose of this conspiracy was to prevent chiropractic from being included within the coverage of medicare and medicaid.

As I have stated, the law allows individuals to combine and agree to petition the government even for anticompetitive purposes. The efforts however must constitute a genuine effort to influence legislation or governmental action and must not be a sham to cover what is actually an attempt to interfere directly with the commercial relationships of a competitor. Attempts to impair the fair and impartial functioning of a government agency or investigative study are not protected by the so-called government action exemption.

I therefore instruct you, that if you should find that the AMA conspired with members of the expert review panel to bias and distort that report; and if you find that such conspiracy was entered into for the purpose or with the effect of causing an unreasonable restraint of trade, then I instruct you that the AMA and any co-conspirator who joined them in this endeavor have violated § 1 of the Sherman Act.

In determining whether the AMA's conduct amounts to an unreasonable restraint of trade, you are to apply the same factors and make the same analysis as I instructed you to make under the rule of reason.

AUTHORITY

Eastern R. R. Pres. Conf. v. Noerr Motor Transport Co., 365 U.S. 127, 144 (1961); *Isreal v. Baxter Laboratories, Inc.*, 1972 Trade Cas., ¶ 73,983, p. 92,098 (D.C. Cir. 1972); *Woods Exploration & Prod. Co., Inc. v. Alcoa*, 1971-Trade Cas. ¶ 73,422 (5th Cir. 1971). *Outboard Marine Corp. v. Pezetel*, 474 F. Supp. 168 (D. Del. 1979).

PLAINTIFF'S EXHIBIT
220
2-15-78

February 20, 1968

Samuel R. Sherman, M.D.
Planning Officer
Mount Zion Hospital and
Medical Center
1000 Divisadero
San Francisco, California 94115

Dear Doctor Sherman:

Enclosed, in narrative form, are some ideas you may want to pass along to Art Hess. We also are enclosing a packet of information on chiropractic you may want to put into his hands.

We think information in this packet documents the opinion of medicine and the rest of the scientific community that chiropractic is an *unscientific cult* that constitutes a hazard to rational health care in the United States.

We will be happy to supply these to anyone else in HEW or elsewhere in government who might have need for them in relation to the chiropractic study.

I'm sure you agree that the AMA hand must not "show" in this matter at this stage of the proposed chiropractic study. But we believe that it is of utmost importance that the study be on the basis of determining whether there is any *scientific* validity to chiropractic. We must guard against the possibility that HEW may decide to do only what is politically expedient and include chiropractic "as licensed at the state level;" or, if a study is undertaken, admit chiropractic's totally *unscientific* testimonials.

We would appreciate hearing from you after the HIBAC meeting and, in the meantime, if there is anything else we can do to help, please let me know.

Sincerely yours,

H. Doyl Taylor
Director

Enclosure
cc: Joseph A. Sabatier, Jr., M.D.
Bernard P. Harrison

PLAINTIFF'S EXHIBIT
253
2-16-78

July 30, 1968

Gerald J. Phaneuf, M.D.
1051 Highland Avenue
Fall River, Massachusetts 02720

Dear Doctor Phaneuf:

I have your very interesting letter of July 22 regarding association with chiropractors. You suggest that a local doctor of medicine should supervise tests requested by chiropractors and that the medical profession be allowed to supervise chiropractors when possible.

Although your arguments are most persuasive, they have not been accepted by the American Medical Association House of Delegates, which establishes policies for the Association and which adopted the Principles of Medical Ethics of the Association. The majority of delegates disagree with your reasoning and feel that although the individual has the right to select whomever he wishes to provide him health care, the patient does not have the right to utilize the services of one deficient in training under the direction of and supervision of one who is trained to the detriment of the public. As a whole, the members of the House of Delegates believe that by condoning supervising or otherwise associating with chiropractors and all other cultists, the public will be misled and cult practice will grow rather than wither away. The facts are that chiropractic has not grown in number under existing policy, whereas there is every evidence to believe that it would grow if AMA policy decisions were relaxed.

Sincerely,

Edwin J. Holman

EJH:11b
AMA 154007

PLAINTIFF'S EXHIBIT
273
2-16-78

MINUTES

AMA Headquarters
Chicago, Illinois

September 15, 1967
9:00 a.m.

COMMITTEE MEMBERS PRESENT:

Joseph A. Sabatier, Jr., M.D., New Orleans, Louisiana (Chairman)
Henry I. Fineberg, M.D., New York, New York
Joseph P. O'Connor, M.D., Pasadena, California
Frederick R. Scroggin, M.D., Dry Ridge, Kentucky
John G. Thomsen, M.D., Des Moines, Iowa

AMA STAFF PRESENT:

H. Doyl Taylor, Department of Investigation
Oliver Field, Department of Investigation
William J. Monaghan, Department of Investigation
Robert A. Youngerman, Department of Investigation (Secretary)
Jack Brown, Field Service
Diane Jacobs, Department of Investigation (Recorder)
Rita Scholz, Department of Investigation (Recorder)

I. INTRODUCTORY REMARKS BY CHAIRMAN—Dr. Sabatier informed the Committee that as a member of the investigating committee created by the Louisiana Legislature he will attempt to gather as much informational material as possible from chiropractic schools and the two associations. He informed the Committee of legal action being taken against six chiropractors in Louisiana. He also reported that press relations in Louisiana on this issue has been excellent.

a. MINUTES OF LAST MEETING—The Minutes of the last meeting, on May 5, 1967, were approved unanimously.

II. CURRENT MATTERS

a. CHIROPRACTIC COVERAGE UNDER MEDICARE—TITLE 18—Mr. Taylor reviewed the events leading up to the sending of telegrams to the House Ways and Means Committee and letters to all members of Congress. He stressed the role played by the Committee secretary and chairman, and the seriousness of the situation at one stage. The importance of Section 141 of H.R. 12080 was stressed. The Committee was informed the Washington office now reports the situation is well in hand, insofar as the House Ways and Means Committee is concerned.

The bill is now before the Senate Finance Committee. The AMA, ICA, and the Louisiana State Medical Society already testified before the Committee. As yet, the ACA has not testified (NOTE: Mr. Erbe of the ACA testified on September 20.) The chiropractors' argument on "freedom of choice" was discussed with suggestions made on how such arguments should be answered.

b. CHIROPRACTIC COVERAGE UNDER WORKERMENS COMPENSATION AND TITLE 19 AND ADOPTION OF POLICY STATEMENT ON CHIROPRACTIC BY STATES—

The Committee agreed with staff suggestions *that prior to seeking removal* of chiropractic from Title 19, it should be determined if Section 141 of H.R. 12080 is to remain in the bill.

Possible amendments to Title 19 were discussed and staff is to maintain liaison with the Council on Legislative Activities.

Dr. Thomsen suggested the possibility be explored of placing in the hands of all congressional and legislative candidates literature on chiropractic. It was suggested that this should be done at the state level. This will be discussed with the Field Service Division.

c. ADOPTION OF POLICY STATEMENT ON CHIROPRACTIC BY ORGANIZATIONS and the American Dental Association, the Arthritis Foundation has the matter under consideration at the present time.

d. CHIROPRACTIC COVERAGE UNDER BLUE SHIELD—Staff will continue to maintain liaison with the National Association of Blue Shield Plans in regard to chiropractic attempts to gain coverage under Blue Shield. (NOTE: A productive meeting was held with representatives of Blue Shield on this point. They are actively considering various methods of excluding chiropractors from Blue Shield coverage.)

e. MEETING WITH HEALTH INSURANCE COUNCIL—Mr. Youngerman reported this meeting has been delayed until some time in October or November. It was suggested that the cost of the M.D. claims vs. D.C. claims be discussed with the Health Insurance Council as well as the Title 18 situation.

f. CORRESPONDENCE WITH FEDERATION OF STATE MEDICAL EXAMINING BOARDS—Additional editorials have appeared in the *Federation Bulletin*, and it appears that more cooperation from the various boards will be received in the future.

g. BASIC SCIENCE EXAMINATION CHEATING BY CHIROPRACTIC STUDENTS—As this case developes, every effort will be made to publicize it as extensively as possible.

h. NATIONAL HEALTH COUNCIL FALL MEETING—Dr. Sabatier is scheduled to speak at the National Health Council Fall Conference to be held in New York City on November 2, 1967. Representatives of NHC member organizations will be present, and the AMA quackery packets, including the chiropractic kits, will be distributed.

FOURTH NATIONAL CONGRESS ON HEALTH QUACKERY—The Fourth National Congress on Health Quackery will be held at the Drake Hotel in Chicago next Fall during AMA Law Week. Plans for Law Week are as

PLAINTIFF'S EXHIBIT

1414

March 14, 1968

11 March 1968

Mr. Doyl Taylor
Department of Investigation
American Medical Association
635 North Dearborn Street
Chicago, Illinois 60010

Dear Doyl,

At the HIBAC Meeting, 2 and 3 March held in Baltimore, I was able to discuss the matter of the HEW study concerning the inclusion of chiropractic service, in future Medicare programs. Unanimous acclaim was given to the concept of using an outside research organization as well as a governmental commission for a detailed study of this program. There was complete acceptance of the concept of preparing the decision on the basis of lack of scientific merit.

Miss Pearl Bierman, of the Public Health Service, is the staff member assigned to drawing up HEW recommendations and has at present all of the AMA material on the subject. She will be glad to hear from you if you have further information. You may mention the fact that I so informed you.

At the meeting it was stated, the Stanford Research Institute would not be an appropriate outside organization because of their already published feelings on the subject of Chiropractics. Therefore, if you have any other ideas as to an appropriate research organization that could carry on the study, please give this information to Miss Bierman.

I am hopeful our attempts to exclude chiropractors in the future will be successful. I can, at this time, give you the complete backing of the HIBAC group.

Sincerely,

SAM
Samuel R. Sherman, M.D.

PLAINTIFF'S EXHIBIT
482
August 30, 1968

August 29, 1968

American Medical Association
Department of Investigation
Mr. H. Doyle Taylor
535 North Dearborn Street
Chicago, Illinois 60610

Dear Doyle,

I have instituted a rather round about procedure to contact Dr. Milbourne with the message. I am working through my partner who is working through some of his New York friends who will attempt to decide who would be the best orthopaedic surgeon in New York to coach Dr. Milbourne.

A young journalist has approached me here in Lexington with requests for information concerning chiropractic. It would be most helpful, I believe, if he could be furnished with the kit. His name is William Simpson and lives at 147 Market Street, Apt. 1, Lexington, Kentucky.

Sincerely yours,

DAVID B. STEVENS, M.D.
David B. Stevens, M.D.

What do you know about American College of Chiropractic?

PLAINTIFF'S EXHIBIT
239
2-15-75

Department of HEW's *Analysis of and Response to the Chiropractic White Paper.* Prepared by the Community Health Service, July 1969.

Forwarded for *INFORMATIONAL PURPOSES ONLY.* Not for distribution.

Chiropractic's "White Paper"

on the report

Independent Practitioners Under Medicare

Introduction

This is an analysis of chiropractic's "White Paper" concerning the recommendation on chiropractic in the report, "Independent Practitioners Under Medicare," which was submitted to Congress by the Department of Health, Education, and Welfare in December, 1968. The White Paper, prepared jointly by the American Chiropractic Association, the Council of State Chiropractic Examining Boards, and the International Chiropractors Association (although later orally disavowed by ICA), was released at a news conference on May 16, 1969, with a news release which stated that chiropractic spokesmen "... accused the U.S. Department of Health, Education, and Welfare of submitting a 'fixed' report to Congress, with false and unreliable information, and charged that it 'exceeded its authority' in a recommendation to exclude chiropractic from Medicare coverage."

The Department's report was prepared at the request of Congress, which directed the Secretary of HEW in Section 141 of Public Law 90-248 as follows:

> The Secretary shall make a study relating to the inclusion under the supplementary medical insurance program (part B of title XVIII of the Social Security Act) of services of additional types of licensed practitioners performing health services in independent practice. The Secretary shall make a report to the Congress prior to January 1, 1969, of his finding with respect to the need for covering, under the supplementary medical insurance program, any of the various types of services such practitioners perform and the costs of such program of covering such additional services, and shall make recommendations as to the priority and method for covering these services and the measures that

should be adopted to protect the health and safety of the individuals to whom such services would be furnished.

The Ad Hoc Consultant Group advised on the total study, including all ten practitioner groups studied. Hence, in addition to the members of scientific professions previously mentioned, it included other persons with special knowledge of the health and other needs of Medicare beneficiaries.

The Ad Hoc Group itself recognized and discussed two possible sources of bias. The first was from attempts by organized groups or individuals with special interests to influence the study. The Group decided that it would not hear or consider material from any group other than those being studied, and that no outside observers would be allowed lest they influence or inhibit the discussions. Thus, when the American Medical Association contacted the former Secretary of HEW and asked to meet with the Ad Hoc Consultant Group, the Group unanimously agreed that such a meeting would be inappropriate.

The second potential source of bias discussed by the Group was that resulting from the fact that its members were sophisticated, professional persons, well-informed about health matters, and inevitably had opinions on all the practitioner groups being studied, including chiropractic. This was coped with in two ways. First, the Group recognized the potential hazard and expressed determination to put aside preconceived ideas and give each profession a thorough, fair, and impartial study. Second, procedures were planned, as described above, to insure that each profession's view got a fair hearing and that views of competing groups were excluded.

The Expert Review Panel on Chiropractic served as technical and scientific advisors to the Ad Hoc Consultant Group. These Panel consultants met the same criteria as the Ad Hoc Consultant Group regarding professional standing and capacity for impartiality and objectivity. In addition, they had to have

special expertise in sciences related to chiropractic, and several of them, through their personal professional interests, had acquired considerable knowledge of chiropractic.

The crux of the charge of bias and prejudice in the White Paper is simply: Is "informed" opinion, such as that represented by the study's advisory groups, inevitably "prejudiced" opinion? Can a group of prominent scientists and other persons, assigned a task such as this study, give fair and impartial consideration to the needs and welfare of Medicare beneficiaries?

The White Paper also suggests that the report was fixed because representatives of the chiropractic profession were not permitted to observe at the meetings of the Ad Hoc Consultant Group. These meetings were not public hearings; they were study sessions at which the consultants, and the representatives of the professional organizations at some sessions, could explore the study issues, ask questions, and express opinions without the inhibition of being continually on public display. Hence, only staff were admitted as observers.

PLAINTIFF'S EXHIBIT
464

MEMORANDUM

TO: Board of Trustees

FROM: Committee on Quackery:
Joseph A. Sabatier, Jr., M.D., Chairman
H. Thomas Ballantine, M.D.
Clarence H. Denser, Jr., M.D.
Henry I. Fineberg, M.D.
David B. Stevens, M.D.
H. Doyl Taylor, Secretary

DATE: January 4, 1971

Since the AMA Board of Trustees' decision, at its meeting on November 2-3, 1963, to establish a Committee on Quackery, your Committee has considered its prime mission to be, first, the containment of chiropractic and, ultimately, the elimination of chiropractic.

Your Committee believes it is well along in its first mission and is, at the same time, moving toward the ultimate goal. This, then, might be considered a progress report on developments in the past seven years. The Committee has not previously submitted such a report because it believes that to make public some of its activities would have been and continues to be unwise. Thus, this Report is intended only for the information of the Board of Trustees.

With establishment of the Committee on Quackery, in 1964, extensive study was made to determine exactly what chiropractic is and where it is most vulnerable to public exposure. At the same time, it became apparent that an intra-professional educational campaign on chiropractic was of prime importance.

Surveys of chiropractic school admission requirements and faculties were conducted and the results published. Pamphlets were produced and distributed. A slide-film presentation was developed and used in ever-growing speaking engagements before medical groups. An exhibit was constructed and used as a vehicle to inform the medical profession at the local, state and national levels.

Then, at the Third National Congress on Health Quackery in 1966, chiropractic was included as a major part of the public program for the first time. (It was given an even greater exposure at the Fourth National Congress on Health Quackery in 1968.)

Two major occurrences in 1966 are noteworthy. First, the U.S. Supreme Court affirmed a federal district court decision holding, in effect, that a state has the right to refuse to license chiropractors unless they have the same qualifications as Doctors of Medicine. Your Committee and its staff assisted in this case. Second, as recommended by your Committee and as submitted by the Board of Trustees, the AMA House of Delegates, for the first time, adopted a specific statement of policy on chiropractic.

This was the necessary tool with which your Committee has been able to broaden the base of its chiropractic campaign. With it, other health-related groups were asked and did adopt the AMA policy statement or individually-phrased versions of it. These, in turn, led to even wider acceptance of the AMA position.

During this period, also, extensive negotiations were carried on in an attempt to obtain a national study of chiropractic, with the pre-determined knowledge that if such a study were done objectively, it could only find that chiropractic is an unscientific cult whose practitioners are not qualified to diagnose and treat human illness.

In 1967, during Congressional consideration of chiropractic demands for inclusion under Medicare, the opportunity arose for a suggestion to be made to the Congress for a governmental study of chiropractic. This was ordered, in the Social Security Amendments of 1967, and the HEW study report was sent to the Congress in December, 1968. This report, made after the most definitive study of chiropractic ever undertaken, is a hard-hitting denial of chiropractic as a health-care service.

In January, 1969, another major event occurred—publication of an exposé of chiropractic by the National Council of Senior Citizens. This Board is familiar with the extensive use made of that report.

There were two other major developments in 1969. First, the publication of a book "At Your Own Risk: The Case Against Chiropractic" and second, the release of Volume II of the Report by the National Advisory Commission on Health Manpower, which is extremely critical of chiropractic licensure at the state level. Both of these were given wide distribution.

During 1970, there have been many other developments, including the report by the HEW Task Force on Medicaid and Related Programs (opposing federal funds for chiropractic under State Medicaid programs), public statements in opposition to chiropractic inclusion under Medicare by the AFL-CIO, the Consumer Federation of America, the American Public Health Association, the Association of American Medical Colleges, the American Hospital Association and others.

The hoped-for effect of this widened base of support was and is to minimize the chiropractic argument that the campaign is simply one of economics, dictated and manipulated by the AMA.

Armed with this growing support, your Committee in the last 15 months has held a Regional Conference on Health Quackery-Chiropractic in each of five regions of the country, to which *all* state and territorial medical societies have been

invited. We believe these have been extremely meaningful and worthwhile, since it is at the State level that chiropractic licensure must be considered. The fruit to be born from these and additional similar meetings, your Committee believes, will be apparent in the near future.

We hope and believe that, with continued aggressive AMA activity, chiropractic can and will be contained at the national level and that steps are being taken to stop or eliminate the licensure of chiropractic at the state level.

PERTINENT STATUTES

SHERMAN ACT, SECTIONS 1 and 2 (15 U.S.C. §§ 1 and 2)

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C. § 2. Monopolizing trade a felony; penalty

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

CLAYTON ACT, SECTIONS 4 AND 16 (15 U.S.C. 15 and 26).

§ 15. Suits by persons injured—Amount of recovery; prejudgment interest

"(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section of any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Recovery by foreign states

(b) (1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to foreign state if—

(A) such foreign state would be denied, under section 1605(a) (2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

Definitions: "commercial activity"; "foreign state"

(c) For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

As amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(1), 94 Stat. 1156; Dec. 29, 1982, Pub.L. 97-393, 96 Stat. 1964.

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is

granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue; *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

As amended Sept. 30, 1976, Pub.L. 94-435, Title III, § 302(3), 90 Stat. 1396; Oct. 17, 1978, Pub.L. 95-473, § 3(b), 92 Stat. 1466.

No. 83-1455

Office - Supreme Court, U.S
FILED
MAR 29 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.

Petitioners,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

Newton N. Minow
Jack R. Bierig*
Jeffrey R. Tone
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Counsel for American Medical Association, H. Doyl Taylor, Joseph A. Sabatier, M.D., H. Thomas Ballantine, M.D., James H. Sammons, M.D.

*Counsel of Record

March 29, 1984

[LIST OF ADDITIONAL COUNSEL APPEARS ON FOLLOWING PAGES]

Max E. Wildman
Douglas R. Carlson
Wildman, Harrold, Allen & Dixon
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312) 222-0400

Richard A. Noffke
B. J. Anderson
William J. Tabor
American Medical Association
535 North Dearborn
Chicago, Illinois 60610
(312) 645-5000

Counsel for American Medical Association, H. Doyl Taylor, Joseph A. Sabatier, M.D., H. Thomas Ballantine, M.D., James H. Sammons, M.D.

Richard L. Epstein
Robert W. McCann
Linda A. Tomaselli
American Hospital Association
840 North Lake Shore Drive
Chicago, Illinois 60611
(312) 280-6000

Donna D. Fraiche
Wyllie, Fraiche & Sullivan
6620 Riverside Drive, Suite 303
Metairie, Louisiana 70003
(504) 456-1447

Counsel for American Hospital Association

Paul G. Gebhard
Allan E. Lapidus
Douglas Polk
Vedder, Price, Kaufman &
Kammholz
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

Counsel for American College of Surgeons

Phil C. Neal
Rowe W. Snider
Friedman & Koven
208 S. LaSalle St.
Chicago, Illinois 60604
(312) 346-8500

Counsel for American College of Physicians

Daniel M. Schuyler
James L. Simon
Schuyler, Roche & Zwirner
3100 Prudential Plaza
Chicago, Illinois 60601
(312) 565-2400

Eleanor Wagner
Joint Commission on Accreditation
of Hospitals
875 North Michigan
Chicago, Illinois 60611
(312) 642-6061

Counsel for Joint Commission on Accreditation of Hospitals

Reuben L. Hedlund
James A. Cherney
David D. Gregg
Latham & Watkins
6900 Sears Tower
Chicago, Illinois 60604
(312) 876-7700

Counsel for American College of Radiology

Perry L. Fuller
Robert E. Nord
Hinshaw, Culbertson, Moelmann, Hoban & Fuller
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4400

Counsel for American Academy of Orthopaedic Surgeons

James W. Rankin
Ann R. Platzer
Kirkland & Ellis
200 East Randolph
Chicago, Illinois 60601
(312) 861-2222

Counsel for Illinois State Medical Society

STATEMENT REQUIRED BY RULE 28.1

None of the respondents have any parent corporations, subsidiaries that are not wholly-owned, or affiliates.

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No. 83-1455

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.

Petitioners,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Plaintiffs have petitioned for certiorari from an interlocutory decision which is not ripe for review by this Court. Specifically, they have asked this Court to consider a Seventh Circuit decision which reversed a judgment

against them and remanded the case for a new trial in the District Court. Petitioners will thus have a second opportunity to present their case to a jury. If unsuccessful on remand, they can come before this Court at the appropriate time. If successful on remand, the issues raised by this petition will have become moot. Thus, now is not the time for Supreme Court consideration of this case—at least absent the most compelling reasons for granting the writ. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967); *American Construction Co.* v. *Jacksonville T. & R.R. Co.*, 148 U.S. 372, 384 (1893).

Petitioners present no reason to grant certiorari at this time. Their first two questions, dealing with the Rule of Reason, raise issues that were decided favorably to them, that may be mooted on remand, and that can be resolved, if necessary, after retrial. Their third question, dealing with the *per se* rule, involves application of well-settled legal principles to the specific facts of this case. Similarly, their fourth question, dealing with the *Noerr-Pennington* doctrine, depends entirely on the facts and raises no significant legal issues. In short, none of the issues presented even approaches the importance required for this Court to grant certiorari at this interlocutory stage.

STATEMENT OF THE CASE

This case involves an antitrust challenge to an ethical guideline issued by the American Medical Association and allegedly implemented by the AMA, seven other medical and health care organizations, and four individual officials ("respondents"). The guideline in question provided that "[a] physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate professionally with anyone who violates this principle."

See Pet. App. 6, 8. This guideline constituted Principle 3 of the AMA's Principles of Medical Ethics (1957 ed.).

Petitioners are five individual chiropractors ("petitioners"). They brought this action in October of 1976 alleging that Principle 3 and respondents' so-called "implementing conduct" had prevented physicians from referring patients to chiropractors, from accepting referrals from chiropractors, and from providing services to chiropractors—all in violation of §§ 1 and 2 of the Sherman Act.[1] They further alleged that certain respondents had violated the antitrust laws by contending in public forums that chiropractic is unscientific and quackery.

The case went to trial in December of 1980 and lasted eight weeks. Petitioners presented facts showing that chiropractic is a method of treating disease through adjustment of the spine. They endeavored to prove that chiropractors seek to serve certain patients who are treated by physicians. Finally, they sought to adduce facts purporting to show that respondents had implemented Principle 3 so as to reduce the ability of chiropractors to compete for these patients.

In turn, respondents introduced evidence explaining the history of and reasons for the challenged conduct and showing its procompetitive effects in the market for physicians' services.[2] They demonstrated why they believed that

[1] This response addresses factual issues without differentiation among the specific positions of the various respondents. Each respondent nonetheless maintains its individual position with respect to the factual characterization of its conduct and the absence of evidence linking it to any alleged conspiracy.

[2] Both petitioners' and respondents' expert witnesses testified that there was no cross-elasticity of demand between medical doctors and chiropractors. Respondents' economist, Dr. Keith Leffler, testified that respondents' conduct had procompetitive effects. Petitioners offered no contrary expert testimony.

lack of scientific training in the diagnosis and treatment of disease often made chiropractors dangerous to patients whom they purported to serve. Further, they showed the widespread nature of the unscientific practices of chiropractors. In short, respondents offered abundant evidence establishing the reasonableness of their belief that for physicians "to collaborate with chiropractors in the care of persons who are patients of the medical doctors is to compromise the application of scientific principles, to violate the oaths taken by the medical doctors, and to introduce risk to the health and lives of the patients for whom the medical doctors have accepted responsibility." Pet. App. 33.

The District Court instructed the jury that the challenged conduct would be unlawful *per se* if the jury found it to have been undertaken "for the specific purpose of excluding chiropractors from the market or injuring them in their ability to compete." *See* Pet. App. 20. Absent such a finding, the jury was to determine whether the conduct "imposed an unreasonable restraint of trade." *Id.* In making this assessment, the jury was to consider several factors. *Id.* at 25-27. The first of these was the effect of the challenged ethical guideline on "competition, if any, that exists between chiropractors generally and medical doctors." *Id.* at 25. In addition, the jury was to consider the effect of the guideline on competition among physicians. Thus, the instructions noted that ethical standards can help "to insure that the profession merits the trust that the public necessarily places in its members" and can give physicians "guidance as to generally accepted standards of conduct in their profession." *Id.* at 26. Finally, the jury was to take into account such matters as "the justification advanced in support of the standard." *Id.* at 29.

The jury returned a verdict for all respondents. It rejected application of the *per se* rule. Further, it found that the challenged conduct satisfied the Rule of Reason.[3]

The Seventh Circuit reversed. It held that the jury instructions had misstated the Rule of Reason. Preliminarily, however, it considered the propriety of a *per se* instruction. Its analysis of the evidence, viewed most favorably to petitioners, led it to reject the assumption "that facts could have been distilled by the jury from this record which would constitute a *per se* violation." Pet. App. 23. Rather, it held that "the nature and extent" of the challenged conduct were "too uncertain to be amenable to *per se* treatment." Therefore, a *per se* instruction was deemed inappropriate. *Id.*

With respect to the Rule of Reason, the Seventh Circuit held that proof by petitioners of an adverse effect on competition would place the burden on respondents to show that the "dominant motivating factor" behind their conduct was an "objectively reasonable" concern for "what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship." Pet. App. 34. In addition, it required respondents to demonstrate that the challenged conduct was the least restrictive alternative available to them. *Id.* The Court concluded that respondents would bear a "heavy burden" in justifying their conduct. *Id.* at 34-35.

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[3] There was abundant evidence from which the jury could find that the overall effect of the challenged guideline was to *promote* competition by raising medical standards, preserving scientific methods of diagnosis and treatment, and promoting public trust in the medical profession. All of these facilitate consumer comparisons among physicians on the basis of quality, price, availability, and other factors. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* 171-91, 275-82 (1977).

The Court also considered whether the First Amendment protected respondents' conduct intended to influence legislative and administrative bodies. In essence, the District Court had instructed that such conduct was lawful if respondents were found to have undertaken it "with a sincere purpose to obtain the governmental actions that they sought." Pet. App. 39. The Court of Appeals held that this instruction correctly reflected controlling decisions of this Court. *Id.* at 39-40.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. The Seventh Circuit Correctly Held That The *Per Se* Rule Has No Application To This Case

Petitioners contend that the Seventh Circuit erred in rejecting a *per se* instruction. This entire argument is based on petitioners' wooden application of the "group boycott" label to the unique facts of this case and the citation of cases which hold that certain group boycotts are illegal *per se*. This argument can be made only by ignoring the facts and distorting the law.[4]

Initially, the Court of Appeals reviewed the evidence and rejected the assumption "that facts could have been distilled by the jury from this record which would constitute a *per se* violation." Pet. App. 23. As the Court pointed out, this is not a case in which physicians are alleged to have entered into an illegal agreement and "have agreed to ostracize or boycott those among them who fail to go along" with their wishes. *Id.* at 17. It is not a case in which

[4] Even petitioners admit that not all "boycotts" are illegal *per se*. Pet. at 23. In essence then, they are simply asking this Court to reexamine the factual context of this case to determine whether the Court of Appeals was correct in its determination that the specific facts of record do not warrant invocation of the *per se* rule. This factual question does not support a grant of certiorari.

physicians "are alleged to have combined to boycott chiropractors in an attempt to coerce the chiropractors to behave in a certain economic manner." *Id.* Indeed, it clearly involved no "compulsion upon anyone to do or to refrain from doing anything else." *Id.* at 23.

As the Court recognized, conduct of this nature should not be condemned without analysis of its competitive significance. In the words of the Court, "a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment." Pet. App. 24. Nothing in any precedent of this Court even remotely suggests a contrary conclusion.

The Rule of Reason is the basic mode of antitrust analysis. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). The *per se* rule applies only to those practices which "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . ." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). It should not be invoked by the uncritical affixation of labels. *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8-10 (1979). Instead, a *per se* approach should be taken only after "considerable experience with certain business relationships" conclusively demonstrates that they lack any procompetitive justification. *Id.*, quoting *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972). Surely, that considerable experience is lacking with respect to the unique set of facts presented here.

This Court has been particularly careful to avoid use of the "group boycott" label to condemn, without further analysis, conduct which may have procompetitive consequences. Thus, the classic formulation of the Rule of Reason is found in a case involving a "group boycott"—as petitioner would use that phrase. Specifically, in *Chicago*

Board of Trade v. *United States*, 246 U.S. 231 (1918), the conduct at issue amounted to a "group boycott" of night traders by exchange members. The Court explicitly rejected the proposition that this conduct could be condemned without a thorough analysis of its competitive significance. *Id.* at 238. The same approach applies equally here.[8]

In fact, invocation of the *per se* rule is particularly inappropriate here since this case arises in the context of an ethical norm of the medical profession. As this Court counseled in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975):

> "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."

In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978), the Court adhered to this position and noted that ethical norms may "regulate and promote" competition and "thus fall within the Rule of Reason." Recently, in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court suggested that a *per se* analysis is improper for agreements that are "prem-

[8] The Supreme Court cases cited by petitioners, Pet. at 22, all dealt with conduct which had no procompetitive justifications or which involved attempts to coerce the plaintiffs to behave in a certain economic manner. Thus, they are readily distinguishable from this case.

ised on public service or ethical norms" or that are alleged to enhance "the quality of the professional service." *Id.* at 349. That is precisely the sort of agreement at issue here. Application of the *per se* rule would only prevent the courts from conducting the analyses appropriate to the professional ethical context of this case.[8]

In short, petitioners' request for a *per se* rule by incantation of the words "group boycott" is nothing more than an effort to exalt semantics over substance. It does violence to the facts of this case and to the decisions of this Court. It affords no basis for the granting of certiorari.

II. The Seventh Circuit Did Not Create An Impermissible Defense Under The Rule of Reason

Petitioners contend that the Seventh Circuit erred by allowing respondents to present a "public health and safety" defense not recognized by the Rule of Reason as set forth in such cases as *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). This contention misreads the decision of the Court of Appeals. On the contrary, the Seventh Circuit explicitly noted that:

> "[A] generalized concern for the health, safety and welfare of the members of the public as to whom a medical doctor has assumed no specific professional responsibility, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with some medical doctors by chiropractors." Pet. App. 37.

[8] As the Court of Appeals put it, "[p]articularly when a conspiracy of this sort is alleged in the context of a profession, the nature and extent of its anticompetitive effect are too uncertain to be amenable to *per se* treatment. . . ." Pet. App. 23.

The Court emphasized that it is "important that the jury understand that a generalized public interest motive affords no legal excuse for such economic warfare." *Id.* at 36.

What the Seventh Circuit did was to require respondents to show:

> "(1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; [and] (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it." *Id.* at 34.[7]

Contrary to petitioners' position, these factors are not irrelevant to the traditional Rule of Reason. As Justice Brandeis pointed out in *Chicago Board of Trade, supra,* 246 U.S. at 238, "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Or, as this Court put it in *Professional Engineers, supra,* 435 U.S. at 692, the Rule of Reason requires analysis of "the facts peculiar to the business, the history of the restraint, and the reason why it was imposed" so that the trier of fact can "form a judgment about the competitive significance of the restraint." The three factors quoted above are all incorporated within these formulations of the Rule.

Thus, petitioners are wrong in claiming that a consideration of the justifications for respondents' conduct constitutes an unprecedented expansion of the Rule of Reason.

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[7] The Court also required respondents to show that their "concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition." Pet. App. 34-35. This modification of the Rule of Reason is unduly favorable to petitioners. *See* Cross-Petition.

See E. Pollock, "The Seventh Circuit and the Rule of Reason," 22 Ill. State Bar Ass'n Antitrust Law J., Vol. I (1983). The inquiry under the Rule of Reason is not restricted, as petitioners would like, to whether respondents' conduct impaired competition between chiropractors and physicians. *See Chicago Board of Trade, supra,* 246 U.S. at 238 ("the legality of an agreement . . . cannot be determined by so simple a test, as whether it restrains competition"). On the contrary, before the overall competitive significance of challenged conduct can be evaluated, an assessment must be made not only of its effect on competition between plaintiffs and defendants, but also of the reasons and procompetitive justifications for it. *Id.* at 238; *Professional Engineers, supra,* 435 U.S. at 692. To that assessment, the history, purposes and nature of the challenged conduct are all relevant factors.

The decision of the Seventh Circuit allows the trier of fact on remand to take these matters into account in forming a judgment about the overall competitive significance of the challenged conduct. It permits the jury to consider whether, considering all factors, such conduct "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade, supra,* 246 U.S. at 238; *Professional Engineers, supra,* 435 U.S. at 691. It does not create a "health, safety and welfare defense."

In sum, the decision of the Seventh Circuit neither modifies the Rule of Reason adversely to petitioners nor allows consideration of values unrelated to competition. The real modification of the Rule of Reason made by that decision was to place upon respondents the burden of persuasion on some factors bearing on competitive significance. *See* Cross-Petition. Petitioners, however, have no cause to complain about this. Accordingly, their petition should be denied.

III. The Seventh Circuit's Treatment of the *Noerr-Pennington* Issue Was Proper

Petitioners object to the Seventh Circuit's affirmance of the District Court's instruction regarding the *Noerr-Pennington* doctrine. Pet. at 27-30. This instruction stated that respondents' advocacy of positions before legislative and administrative bodies was lawful if "the defendants undertook such efforts to influence governmental bodies with a sincere purpose to obtain the governmental actions that they sought." Pet. App. 39. This instruction correctly states the *Noerr-Pennington* doctrine, and the Seventh Circuit properly affirmed it.

Petitioners contend, however, that this instruction prohibited the jury from taking into account evidence relating to the AMA's purported role in an HEW study regarding chiropractic. The question of what role the AMA played in the HEW study is purely factual. The question presented by petitioners involves no more than the application of well-settled legal principles to those facts. It offers no reason to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Newton N. Minow
Jack R. Bierig*
Jeffrey R. Tone
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

Max E. Wildman
Douglas R. Carlson
Wildman, Harrold, Allen & Dixon
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
(312) 222-0400

Richard A. Noffke
B. J. Anderson
William J. Tabor
American Medical Association
535 North Dearborn
Chicago, Illinois 60610
(312) 645-5000

Counsel for American Medical Association, H. Doyl Taylor, Joseph A. Sabatier, M.D., H. Thomas Ballantine, M.D., James H. Sammons, M.D.

Richard L. Epstein
Robert W. McCann
Linda A. Tomaselli
American Hospital Association
840 North Lake Shore Drive
Chicago, Illinois 60611
(312) 280-6000

* Counsel of Record

Donna D. Fraiche
Wyllie, Fraiche & Sullivan
6620 Riverside Drive, Suite 303
Metairie, Louisiana 70003
(504) 456-1447

Counsel for American Hospital Association

Paul G. Gebhard
Allan E. Lapidus
Douglas Polk
Vedder, Price, Kaufman & Kammholz
115 South LaSalle Street
Chicago, Illinois 60603
(312) 781-2200

Counsel for American College of Surgeons

Phil C. Neal
Rowe W. Snider
Friedman & Koven
208 S. LaSalle St.
Chicago, Illinois 60604
(312) 346-8500

Counsel for American College of Physicians

Daniel M. Schuyler
James L. Simon
Schuyler, Roche & Zwirner
3100 Prudential Plaza
Chicago, Illinois 60601
(312) 565-2400

Eleanor Wagner
Joint Commission on Accreditation
of Hospitals
875 North Michigan
Chicago, Illinois 60611
(312) 642-6061

Counsel for Joint Commission on Accreditation of Hospitals

Reuben L. Hedlund
James A. Cherney
David D. Gregg
Latham & Watkins
6900 Sears Tower
Chicago, Illinois 60604
(312) 876-7700

Counsel for American College of Radiology

Perry L. Fuller
Robert E. Nord
Hinshaw, Culbertson, Moelmann,
Hoban & Fuller
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4400

Counsel for American Academy of Orthopaedic Surgeons

James W. Rankin
Ann R. Platzer
Kirkland & Ellis
200 East Randolph
Chicago, Illinois 60601
(312) 861-2222

Counsel for Illinois State Medical Society

Office - Supreme Court.
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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE P. MCANDREWS
(Counsel of Record)
TIMOTHY J. MALLOY
ROBERT C. RYAN
ALLEGRETTI, NEWITT, WITCOFF & MCANDREWS, LTD.
125 South Wacker Drive
Chicago, Illinois 60606
(312) 372-2160

PAUL E. SLATER
SPERLING, SLATER & SPITZ
55 West Monroe Street
Chicago, Illinois 60603
(312) 641-3200

Attorneys for Petitioners

April 30, 1984

Paddick Midwest Inc., Chicago • 454-7600

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I. INTRODUCTION

This Court should either sanction or reject major revisions (which this Court has always refused to countenance) in the Rule of Reason and in the *per se* rule, which revisions allow private associations to encroach upon the legislative process and restrict competition in the name of health, safety, and welfare.

The broad legal issue presented by the Petition, and not addressed by the Response, is whether any group of health care providers may (1) target a competitive licensed profession for elimination,[1] (2) implement that goal by a nationwide private[2] boycott, and (3) justify the resulting significant restraint of trade under the Sherman Act by asserting that the boycott was desirable to improve patient care.

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[1] The AMA Board of Trustees, on November 2-3, 1963, organized and funded a Committee, the "prime mission" of which was "first the containment of chiropractic and, ultimately, the elimination of chiropractic." Pet. App. 6, 75.

[2] Petitioners chose to "implement" their "contain and eliminate" plan by using a private boycott because they could not convince any state legislature to reject or retract the license privileges of chiropractors and because petitioners discovered an increasing amount of professional cooperation between chiropractors and petitioners' member physicians. For example: "One of the more surprising items brought to the attention of the Committee is reported to be professional cooperation and association between Doctors of Medicine and these [chiropractors]." PX 174 (1966 letter of AMA Committee to all affiliated medical societies).

The private boycott directly challenged both the state legislatures and all professional and institutional cooperation. For example:

> This is in answer to your letter of December 18 referring to a bill which may be passed in New Mexico that hospitals must accept chiropractors as members of the medical staff.
>
> You are absolutely correct—the unfortunate results of this most ill-advised legislation would be that the Joint Commission would withdraw and refuse accreditation of the hospital that had chiropractors on its medical staff.

PX 10A (letters of JCAH to New Mexico hospital, dated January 9,

(footnote continued on following page)

This Court's and other courts of appeals' precedents answer "*No.*"[3] The Seventh Circuit, however, said "*Yes.*" Resolution of the obvious conflict is of great importance to the application of the antitrust laws in the vast and growing health care field and to numerous pending antitrust suits throughout the country.

II. THIS CASE IS OF EXCEPTIONAL IMPORTANCE TO THE ADMINISTRATION OF THE ANTITRUST LAWS AND MERITS IMMEDIATE REVIEW BY THE SUPREME COURT

It is, of course, true, as respondents state, that the court of appeals' ruling is interlocutory. Nevertheless, the unprecedented[4] and clear-cut rulings of the Seventh Circuit are based on an eight-week trial record comprised of eight thousand pages of testimony and hundreds of exhibits. The Seventh

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(footnote continued from previous page)

1973). And as a further example:

> RESOLVED: That MSMS [Michigan State Medical Society] inform its membership that it is considered *unethical* by the AMA and, henceforth, by the MSMS *for a doctor of medicine to refer a patient to a chiropractor for any reason.*

PX 1291 (emphasis added) (dated May 23, 1973). In addition, another example explained, "It might be wise to prohibit any contact of any kind, at any time, by persons at the Medical Center with any chiropractor." PX 1626 (letter of ISMS Chairman to University of Illinois College of Medicine, dated January 11, 1974).

[3] For example, most recently this Court explained, "Thus we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care." *Jefferson Parish Hospital v. Hyde*, 1984-1 Trade Cas. (CCH) ¶ 65,908, n.41 (1984). And, as explained in the three Justice dissent from denial of *certorari* in *Union Processing Corp. v. Atkins*, 104 S.Ct. 1316, 1317 (1984), "We have time and again 'rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.'" See pp. 8-9 *infra*.

[4] Judge Doyle admitted that his ruling departed from the Rule of Reason standard followed by this Court for over 60 years. Pet. App. 24, 31-32.

Circuit painstakingly analyzed that record and neither petitioners nor respondents have quarreled with its factual analysis. The instant dispute is over three well defined, but obviously erroneous, legal rulings.

This Court in the past has granted plenary review of interlocutory decisions that present an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." R. Stern & E. Gressman, *Supreme Court Practice* p. 301 (Fifth Ed. 1978). See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (case reviewed on the basis of summary judgment record alone—before trial but after remand for trial following affirmance of trial court's denial of motion for summary judgment).

Respondents's position that there are no "compelling reasons for granting the writ" (Response at 2) is contradicted by respondents' unsuccessful joint Petition for Rehearing and Suggestion for Rehearing In Banc, at 2-3, in which they stated:

> This petition for rehearing is of exceptional importance because the panel's decision conflicts with the holdings of numerous Supreme Court, Seventh Circuit, and other court of appeals decisions. . . . [T]he panel's decision . . . establishes major new law in this Circuit that will govern numerous other cases as well as the retrial of this case.

Respondent American Academy of Orthopaedic Surgeons was equally emphatic in its separate Petition for Rehearing with Suggestion for Rehearing In Banc, at 2-4. It stated:

> Rehearing of this case by the full Court is necessary because *the proceeding involves legal and factual questions of exceptional importance:*
>
> . . . .
>
> 5. This case is the first of several 'carbon copy' antitrust suits filed by chiropractors against these same defendants to be tried. The decision of this appeal will, therefore, affect not only further proceedings in this case, but the legal standards applicable to disposition of similar claims by other chiropractors presently pending or yet to be filed.

Respondents and petitioners are not alone in their view that this case presents legal issues of exceptional importance. For example, appended hereto is an analysis of the Seventh Circuit opinion in this case, prepared by Walter T. Winslow, Esq., Deputy Director of the Bureau of Competition of the Federal Trade Commission, and presented to the National Health Lawyers Association Seminar in Washington, D.C., on January 25-27, 1984. Reply App. 1-3. Mr. Winslow concludes: that in this case the Seventh Circuit created a special and unnecessary defense to a Rule of Reason violation; that the holding on the unavailability of the *per se* rule was similarly erroneous; and that the decision has the potential to undermine antitrust enforcement in other contexts. *Id.*

Petitioners respectfully suggest that this Court seek the views of the Federal Trade Commission and the Department of Justice on the appropriateness of Supreme Court review at this time and the impact of the decision below on the enforcement of the antitrust laws in the vast and rapidly expanding health care industry.

III. THE COURT OF APPEALS ACKNOWLEDGED THAT IT WAS DEPARTING FROM THE TRADITIONAL RULE OF REASON ANALYSIS TO ALLOW A DEFENSE BASED ON VALUES INDEPENDENT OF COMPETITION

Respondents argue that the Seventh Circuit merely applied "a traditional rule of reason" analysis[5] (Response at 10) to determine whether the challenged conduct was, on balance, anticompetitive.[6] That would be news to the Seventh Circuit.

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[5] The E. Pollack identified as the author of the 1983 article entitled "The Seventh Circuit and the Rule of Reason," referred to on page 11 of the Response, was counsel of record for respondent American Hospital Association through a significant portion of this case.

[6] Respondents contend they submitted evidence that their boycott had procompetitive effects. Response at 3 n. 2, 5 n. 3. This contention is utterly without merit. Respondents' own expert testified: that without the boycott consumers would view chiropractors and medical doctors as offering closely substitutable services; that "ruinous

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The Seventh Circuit candidly and unequivocally admitted that it was departing from the traditional Rule of Reason analysis and modifying that age-old standard to allow a defense, based on a "patient care" motive, for conduct that is, on balance, anticompetitive. Pet. App. 24, 32-35. Specifically, the appellate court held that the single test under the traditional Rule of Reason was "whether the challenged agreement is one that promotes competition or one that suppresses competition." Pet. App. 24. The court, however, concluded that, "in a case involving . . . ethics for the medical profession," it was "free to modify the rule of reason test." Pet. App. 32.

In making that unprecedented "modification," the court held that it was petitioners' burden to initially establish that the effect of respondents' conduct, on balance, was to "restrict competition rather than to promote it." Pet. App. 34. That, of course, is the sum total of the traditional Rule of Reason test.

The court, however, went further and specifically ruled that respondents could "justify [the] significant anticompetitive effect" of their conduct (found under the traditional Rule of Reason analysis) if the respondents could then establish: (1) that they had a genuine concern for patient care; (2) that the concern was objectively reasonable; and (3) that the concern was the dominant motivating factor in respondents' conduct. Pet. App. 34.

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competition" would ensue; and that the chiropractors, because they charge lower fees than the medical doctors, might run the doctors out of the market. It is precisely this sort of conspiracy, designed to avoid "ruinous competition," which the Sherman Act forbids. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221 (1940). Respondents also argue that there is no cross-elasticity of demand between medical doctors and chiropractors. What the trial court record actually establishes is that medical doctors and chiropractors compete for patients, but because insurance companies pay the majority of medical bills, consumers are not price sensitive.

In a convoluted effort to avoid Supreme Court review, respondents deny reality[7] and argue that the Seventh Circuit did not expand the Rule of Reason to allow respondents a "patient care" defense for a manifestly anticompetitive conspiracy (directed specifically at driving a competitive profession out of the health care markets where their members compete—all without approval from any legislature involved in licensing the competitors to deliver health care in those markets). Respondents argue that the new "patient care" defense is actually no more than part of the traditional Rule of Reason analysis, which includes consideration of the history of the restraint, the reasons for adopting the restraint, and the ends to be sought.[8]

This argument ignores the fact (recognized by the Seventh Circuit) that the history of the restraint and reasons for adopting it are pertinent to the Rule of Reason only insofar as they indicate whether an anticompetitive effect will or did occur. See Pet. App. 29-31. The Seventh Circuit held, however, that *after* petitioners prove the existence of an anticompetitive effect under the Rule of Reason, respondents

[7] Respondents, for example, argue that the court rejected a defense based on a "generalized concern for health safety and welfare." Response at 9, 10. This is true, but respondents ignore the fact that the court merely substituted a "patient care motive" for the "generalized public interest motive." Pet. App. 36. The court thus ruled there could be justification for *anticompetitive conduct* based on the patient-care motive.

[8] Respondents argue that the Seventh Circuit found no agreement "to ostracize or boycott [physicians] among them who fail to go along." Response at 6. What the Seventh Circuit actually stated rhetorically was that there was no agreement to ostracize or boycott physicians who failed to go along with an agreement "to fix prices." Pet. App. 17. The Seventh Circuit in this case was operating under the legally erroneous view that price fixing is the only *per se* antitrust violation. Naturally, a physician who is found to be unethical is "ostracized" and the fear of that finding is "compulsion." See, e.g., discussion of PX 880 in Petitioners' Response to Cross-Petition at 3. There was also evidence that medical physicians who dealt with chiropractors were called before their Society's Ethics Committee and that hospitals were threatened with disaccreditation if they dealt with chiropractors. Pet. App. 8-9.

can then "*justify*" or defend the restraint on the basis of a patient-care motive—which the Seventh Circuit correctly acknowledged is "*a value independent of the values attributed to unrestrained competition.*" Pet. App. 34 (emphasis added). The Seventh Circuit therefore did not confine the patient care motive within the analysis of whether competition was restrained, and instead the court created a patient-care defense.

This Court has repeatedly held that there is no such defense—that good motives and concern for public health and welfare cannot justify an injury to competition and are not to be considered as part of the Rule of Reason analysis. *Fashion Originators' Guild of America, Inc. v. F.T.C.*, 312 U.S. 457 (1941); *National Society of Professional Engineers v. United States*, 453 U.S. 679 (1978). Notwithstanding respondents' revisionist view of the opinion below, it is clear that the Seventh Circuit departed from this Court's mandate and intended to and did announce a major change in the antitrust laws. A historic alteration of this sort is of exceptional importance and merits review by this Court.

IV. THE COURT IMPROPERLY HELD THAT THE *PER SE* RULE IS NOT APPLICABLE TO THE MEDICAL PROFESSION.

The court of appeals ruled that no *per se* instruction should be given in this case due to: (1) the presence of a patient-care motive; (2) the fact that the conduct was undertaken by a learned profession; (3) the legal conclusion that only boycotts intended to enforce price fixing agreements are *per se* illegal; and (4) the fact that the boycott was aimed at respondents' competitors rather than consumers.[9] Pet. App. 23-24. Each of those holdings is unprecedented, in conflict with existing law, and dramatically wrong.

Respondents do not even attempt to defend these holdings. Rather, as with their argument concerning the Rule of Reason,

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[9] This holding is particularly bizarre and would lead to the conclusion that a horizontal boycott, intended to eliminate half of the competitors in a relevant market, would escape *per se* condemnation

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they simply misstate the Seventh Circuit's indefensible opinion and pretend that the Seventh Circuit did not say what it clearly intended to and did say. For example, respondents argue that the Seventh Circuit merely held that the factual predicate necessary for the *per se* rule was not established at trial. This is a convenient but erroneous argument, for, *inter alia,* it ignores the reasons given by the Seventh Circuit for reaching its conclusion, *i.e.,* "because the evidence of the 'patient care motive' required that a rule of reason analysis be applied," because the case arose "in the context of a profession," and because compulsion was only exerted upon medical doctors and facilities and chiropractors, not consumers. Pet. App. 23.

Each of these holdings represents a clear departure from Supreme Court and other court of appeals precedent. In *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332 (1982), this Court applied a *per se* rule to the medical profession. Even more recently, in *Jefferson Parish Hospital v. Hyde,* 1984-1 Trade Cas. (CCH) ¶ 65,908, n.41, n.42 (1984), this Court not only confirmed that *per se* rules could be applied to the medical profession, but also specifically rejected a district court ruling that the *per se* rule was inappropriate due to the existence of a patient-care motive;

> Conversely, with such evidence [of market power over the tying product] the *per se* rule against tying may apply. Thus we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purposes of improving *patient care*.... In the past, we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved.

(emphasis added) (citing, *inter alia, American Medical Ass'n v.*

(footnote continued from previous page)

because it was not directed at consumers or at competitors who dealt with consumers in particular ways. Petitioners are aware of no court, other than the Seventh Circuit in the decision below, which has ever so held.

United States, 317 U.S. 519, 528-29 (1943)). And in *A.M.A. v. U.S.*, 130 F. 2d 233, 248 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943), the court of appeals told the A.M.A. itself:

> There is a very real difference between the use of such self-discipline and *an effort on the part of such association to destroy* competing professional or business groups or organizations.

It is noteworthy that *Hyde* did not involve an agreement to fix prices or enforce a price-fixing agreement—yet the efficacy of the *per se* rule was sustained. Indeed, this Court in *Hyde* specifically affirmed that a *per se* violation is made out where defendants have "concertedly refused to deal with non-members of an association." 1984-1 Trade Cas. at 67,899 n. 10.[10] The Seventh Circuit rulings are in direct conflict with these holdings of this Court.

V. THE RESPONDENTS' EFFORTS TO FIX THE HEW EXPERT REVIEW PANEL REPORT IS NOT IMMUNE FROM ANTITRUST CONSEQUENCES

The trial court refused a proper instruction to the jury relating to evidence of the "fix" of the HEW Expert Review Panel report (Pet. App. 61) and, instead, gave two instructions (Pet. App. 59, 60) that removed any fraudulent activity or fix by respondents from antitrust consideration by the jury if the "fixers" were "sincere" in their efforts to use the fixed agency report to ultimately influence legislation. The Seventh Circuit affirmed. The instructions given ignored both the fraud on the agency and the extensive use made of the tainted report in the private boycott. They are so clearly wrong that respondents do not even attempt a logical defense of the court of appeals' action concerning these instructions. Petitioners stand on their argument on this point presented in their main brief.

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[10] In *Union Processing Corp. v. Atkins*, 104 S. Ct. 1316 (1984), this Court denied *certiorari*, and Mr. Justice White, joined by the Chief Justice and Mr. Justice Powell, filed a dissenting opinion. Justice White pointed out that a horizontal agreement to allocate territories was a classic example of a *per se* violation and stated: "We have time and again rejected the notion that naked restraints of trade are to be tolerated because they are *well intended or because they are allegedly developed to increase competition.*" *Union Processing*, 104 S. Ct. at 1317.

VI. CONCLUSION

Petitioners believe, and in their Petitions For Rehearing *In Banc* respondents agreed and vigorously urged, that this case is of exceptional importance to the application of the antitrust laws in the health care field and in this and other pending cases and that the ruling of the Seventh Circuit is in direct conflict with numerous decisions of this Court and other circuit courts of appeal.

Does the *per se* rule apply to horizontal group boycotts in the health care field? May a conspiratorial effort to eliminate a licensed competitive health care profession through a group boycott be excused if the perpetrators can prove a "patient care" motive?

This case involves clear-cut legal issues and is precisely the type of case that ought to be decided at this juncture by the Supreme Court. Accordingly, petitioners request that their Petition for Writ of *Certiorari* be granted.

Respectfully submitted,

GEORGE P. MCANDREWS
(Counsel of Record)
TIMOTHY J. MALLOY
ROBERT C. RYAN
ALLEGRETTI, NEWITT, WITCOFF
& MCANDREWS, LTD.
125 South Wacker Drive
Chicago, Illinois 60606
(312) 372-2160

PAUL E. SLATER
SPERLING, SLATER & SPITZ
55 West Monroe Street
Chicago, Illinois 60603
(312) 641-3200
Attorneys for Petitioners

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THE NATIONAL HEALTH LAWYERS ASSOCIATION

ANTITRUST IN THE HEALTH CARE FIELD

The Washington Hilton Hotel
Washington, D.C.
January 25-27, 1984

ALTERNATIVE DELIVERY SYSTEMS:

PPOs

Walter T. Winslow, Esq.
Federal Trade Commission
Washington, D.C.

Moderator:

Phillip A. Proger, Esq.
Baker & Hostetler
Washington, D.C.

the circumstances have been an unreasonable restraint of trade." 691 F.2d at 685.

While we believe decision is incorrect, if anything, it should be read as an implied repeal case, not establishing a new or different substantive standard under the antitrust laws.

8) *Wilk v. American Medical Association,* 1983-2 Trade Cas. (CCH) ¶ 65,617 (7th Cir. 1983).

Alleged boycott of chiropractors, effected through ethical canons, while itself normally *per se* illegal, was not subject to *per se* analysis. Defendants would be permitted to show that the restraint, in the circumstances peculiar to a learned profession: 1) was based on a genuine concern about the scientific validity of the patients' treatment; 2) that this concern was objectively reasonable; 3) that this concern was the dominant motivating factor in promulgating the canon and the conduct intended to implement it; and 4) that the concern for scientific method in patient care could not have been adequately implemented in a manner less restrictive of competition.

Although case deals with boycott, not price-fixing, its special rule of reason defense is not needed to protect legitimate ethical rules, and it has potential for undermining *per se* standard in other contexts, *e.g.,*

Professional Engineers case, where concern about safety held no defense to anticompetitive ethical restraint against competitive bidding.

b) *Vertical price-fixing—*

1) *FTC Advisory Opinion—Health Care Management Associates (June 7, 1983).*

(1) limited to 10-15 percent of area providers;

(2) purchaser market of about 30% of area's employed population;

(3) no agreement on price/discount terms by competing providers.

(4) the program, "in essence, would be a form of vertical arrangement between individual sellers of services (cooperating providers) and purchasers of services (third-party payers, on behalf of their insureds or beneficiaries) for the sale and purchase of health care services." (p. 3).

"It appears ... that the [Plan] ... is likely to be procompetitive, both by generating competition between cooperating providers and other local providers and by increasing competition among third-party payers." (p. 4).